



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Reserved on: January 20, 2022***

Pronounced on: January 28, 2022

+ **ARB.P. 1216/2021**

SRICO PROJECTS PVT. LTD. Petitioner

Through: Mr. Shoeb Alam, Ms.Fauzia
Shakil & Mr. Ujjwal Singh,
Advocates

Versus

CENTRAL RAILSIDE WAREHOUSE CO. LTD. Respondent

Through: Mr. K. K. Tyagi & Mr.Iftekhar
Ahmad, Advocates

CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT

JUDGMENT

1. The present Petition is preferred by the petitioner under Section 11 (5) r/w Section (6) of the Arbitration and Conciliation Act, 1996 seeking appointment of sole Arbitrator in terms of Clause- 25 of Clauses of Contract of the Agreement dated 16.11.2017 executed with respondent.

2. Petitioner-M/s SRICO Projects Pvt. Ltd. is a company registered under the Companies Act, 1956 and with MSME and respondent- Central Railside Warehouse Co. Ltd., an Enterprise of the Government of India, is also a company registered under the Companies Act, 1956.



3. According to petitioner, it has participated in the tender process issued by the respondent on 05.05.2017 for construction of 20400 MTC Warehouse along with ancillaries, internal roads, and electrical installation with temperature control facility at Fatuha, Bihar, at an estimated cost of Rs.12,91,46,503.19/- and was awarded the said work at an estimate cost of Rs.22,08,40,520.45/- and for this purpose, an Agreement was executed at New Delhi on 16.11.2017. In terms of the contract, petitioner was required to furnish a security deposit of 5% of the tendered value in terms of Clause 15(i) and performance security/guarantee of 5% of the tendered value i.e. Rs.1,10,42,000/-. The work was to commence within 10 days of allocation of work order and was to be completed within 15 months thereof i.e. by 11.02.2019. However, the date of completion of work was extended various times and thereby, completion of project was extended to or before 30-06-2020. Petitioner claims to have satisfactorily completed the project before 30.06.2020 and after completing the necessary Defects Liability Period of one year as per the agreement, the project site was handed over to the respondent on 30.06.2021.

4. According to petitioner, respondent vide letter dated 15.04.2021



informed the petitioner that from the payable amount of the submitted 13th RA Bill dated 06.07.2021, a deduction of Rs.1,32,50,431.23/- (Rs.1,56,35,308/- with 18% GST) would be done on account of alleged delay in the completion of project. In reply to the aforesaid letter, petitioner by its reply dated 01.06.2021 denied respondents attribution of delay, liability and default on the petitioner and also requested for an amicable resolution of the disputes.

5. During the course of hearing, learned counsel for petitioner submitted that delay in completion of the project occurred due to various and frequent breaches of project, warranties, conditions, timelines, delay in removal of obstruction on sites, multiple modifications at the end of respondent and in fact, petitioner had suffered huge losses due to repeated and prolonged delays.

6. Further, petitioner vide its letter dated 22.10.2021 called upon the Managing Director of the respondent-company for release of the amount deducted from the RA bill of petitioner, which was not replied to. Thereafter, vide notice dated 12.11.2021 petitioner invoked arbitration and proposed name of Mr. Justice (Retd.) Dharnidhar Jha to act as sole arbitrator. However, the Managing Director of respondent by



communication dated 22.11.2021 appointed Sh. Ratnesh Kumar Bariar as the Sole Arbitrator to adjudicate the disputes between the parties.

7. Learned counsel for petitioner submitted that appointment of Ratnesh Kumar Bariar as the Sole Arbitrator by the respondent after petitioner has appointed Mr. Justice (Retd.) Dharnidhar Jha to act as sole arbitrator, is arbitrary, illegal and non est in law. To submit that respondent is barred by law from vesting the appointing authority in the hands of a person who has an interest in the outcome of the dispute, reliance was placed upon Hon'ble Supreme Court's decision in ***Perkins Eastman Architects DPC & Anr. Vs. HSCC (India) Ltd.*** 2019 SCC Online SC 1517 and ***TRF Limited Vs. Energo Engineering Projects Limited*** (2017) 8 SCC 377 and also that in view of these decisions, the Managing Director has become ineligible to unilaterally appoint the Arbitrator.

8. To the contrary, learned counsel appearing on behalf of respondent strongly opposed the claims raised in the present petition and submitted that in terms of Clause-25 of the Agreement in question, the Managing Director of the respondent is empowered to appoint sole arbitrator and therefore, the proposed appointment of arbitrator by the respondent



cannot be challenged. Learned counsel submitted that the decisions relied upon by the petitioner do not in any manner disentitle the Managing Director to appoint the Arbitrator being not disqualified under Section 12(5) r/w Schedule VII of the Agreement. It was further submitted by learned counsel that in ***Union of India Vs. Pradeep Vinod Construction Company*** (2020) 2 SCC 464 and ***Central Organization for Railway Electrification vs. M/s. ECI-SPIC-SMO-MCML (JV) A Joint Venture Company*** 2020(14) SCC 712, the Hon'ble Supreme Court has held that the appointment has to be in terms of Agreement only.

9. The submissions advanced by both the sides were heard at length and the material placed on record as well as decisions cited have been gone through by this Court.

10. It is not in dispute in respect of work order in question, an Agreement dated 16.11.2017 was executed between petitioner and respondent, which contained arbitration clause, which reads as under:-

“25. Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship of 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,



drawing, 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 referred to the sole arbitration of the person appointed by the Managing Director, Central Railside Warehouse Company Limited at the time of dispute or if there be no Managing Director, CRWC, the Administrative Head of the said Central Railside Warehouse Company Limited at the time of such appointment.

There will be no objection to any such appointment that the arbitrator so appointed is an employee/retired employee of the Company that he had to deal with the matters to which the contract relates and that in course of his duties as Company employee, he had expressed views on allow any of the matters in the dispute or difference.

If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever or is heavenly abode, another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is also a term of this contract that no person other than a person appointed by the Managing Director or Administrative Head of the CRWC as aforesaid should act as an arbitrator and if for any reason that is not possible, the matter is not to be referred to arbitration at all...”



11. For adjudication of disputes arising out of work order in question, petitioner invoked arbitration vide notice dated 12.11.2021 and proposed name of sole Arbitrator to the respondent. The said communication was not replied and instead, respondent vide its letter dated 22.11.2021, through its Managing Director appointed its own Arbitrator on the ground that Clause-25 of the Agreement in question provides that any dispute between the parties shall be referred to the sole arbitrator appointed by the Managing Director of respondent.

12. During the hearing, counsel representing both the sides have resorted to the provisions of Section 12(5) of the Arbitration and Conciliation Act, 1996 in support of their claims. According to petitioner, by virtue of Section 12(5), the Managing Director of respondent is ineligible to appoint the Arbitrator, whereas according to respondent, Section 12(5) only provides disqualifications for appointment of Arbitrator and not for the appointing authorities.

13. There is no dispute to the ratio of law laid down by the Hon'ble Supreme Court in *Union of India Vs. Pradeep Vinod Construction (Supra)*, wherein it is held that when the agreement specifically provides for appointment of a named Arbitrator, the appointment should be done



in terms of the Agreement unless there are exceptional reasons. However, the said decision does not deal with the provisions of Section 12(5) of the Act. Also, decision in ***Central Organization for Railway Electrification (Supra)*** has been referred to the Larger Bench and is thus, not applicable to the present case.

14. Pertinently, Section 12(5) read with Schedule VII of the Arbitration and Conciliation Act deals with the impartiality and independence of arbitrator and prescribes ineligibility of a person to be appointed as an arbitrator. The Hon'ble Supreme in ***Perkins Eastman Architects DPC (Supra)*** has elaboratively discussed the observations made in ***TRF Limited (Supra)*** and 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 Limited⁴, 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.”*

15. Pursuant to the aforesaid observations, the Hon’ble Supreme Court in ***Perkins Eastman Architects DPC (Supra)*** annulled the effect of letter appointing Arbitrator and while exercising the power under Section 11(6) of the Act, appointed the Arbitrator in the said case.

16. Applying the dictum of Hon’ble Supreme Court in ***Perkins Eastman Architects DPC (Supra)*** to the case in hand, this Court finds appointment of sole arbitrator at the hands of respondent shall not render the dispute resolution process thorough arbitration unbiased and therefore, Clause-25 of the Agreement vesting the right to appoint Arbitrator by the respondent cannot be sustained. Consequentially, respondent’s



communication dated 22.11.2021 deserves to be quashed.

17. In the light of afore-noted observations, the present petition is allowed. Accordingly, **Mr. Justice (Retd.) Jitendera Chauhan (Mobile:9780008142)** is appointed the sole Arbitrator to adjudicate the dispute between the parties.

18. The fee of the learned Arbitrator shall be governed by the Fourth Schedule of the Arbitration and Conciliation Act, 1996.

19. The learned Arbitrator shall ensure compliance of Section 12 of Arbitration and Conciliation Act, 1996 before commencing the arbitration.

20. The present petition and pending application, if any, are accordingly disposed of.

(SURESH KUMAR KAIT)
JUDGE

JANUARY 28, 2022

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