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IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

AP/94/2023

DALMIA CEMENT (BHARAT) LIMITED
VS.
SOUTH EASTERN RAILWAY AND ORS.

BEFORE :
THE HON'BLE JUSTICE SABYASACHI BHATTACHARYYA
Date : 10th April, 2023

Appearance :
Mr. Sankarsan Sarkar, Adv.
Mr. Arindam Chandra, Adv.
Mr. Atish Ghosh, Adv.
Mr. Shayak Mitra, Adv.
Ms. Antara Dey, Adv.
.....for petitioner.
Mr. Asok Kr. Chakraborty, Ld. ASG
Mr. S.K. Tiwari, Adv.
...for respondent

The Court : - Learned Counsel for the petitioner contends that although in Clause 18 of the agreement between the parties dated March 12, 2019, there is an arbitration clause which provides that an Arbitrator shall be appointed by the General Manager, South Eastern Railway, the same is not conclusive inasmuch as the General Manager is an employee of the South Eastern Railway and the said Railway is a party to the dispute. Hence, he would obviously have conflict of interest and, thus, ineligible to appoint Arbitrator or act as an Arbitrator, within the contemplation of the Arbitration & Conciliation Act, 1996 and its Schedules.

Learned Counsel cites *Perkins Eastman Architects DPC And Another vs. HSCC (India) Limited*, reported at (2020) 20 SCC 760 and *Central Organisation for Railway Electrification vs. ECI-SPIC-SMO-MCML (JV) A Joint Venture Company*, reported at (2020) 14 SCC 712.

It is submitted that in the first cited judgement it was squarely held that the relevant clause in the said case had nominated the Managing Director himself to be the

sole arbitrator and had also empowered the said Managing Director to nominate another person to act as an Arbitrator. It was further analyzed that the Managing Director had two capacities under the clause, first as an arbitrator and the second as an appointing authority. It was principally held therein that there would be a direct conflict of interest which would make the Managing Director ineligible to appoint or be appointed as an Arbitrator.

While distinguishing *Central Organisation for Railway Electrification (supra)*, learned counsel submits that there were certain other distinguishing factors in the said judgement. First, in that case, the contemplation of the arbitration agreement was to appoint several arbitrators, one nominated by each of the parties, who would be, in turn, appointing a third arbitrator, which would counter-balance the conflict of interest of the parties. That apart, in the said case there were three arbitrators to be appointed, whereas in the present case the arbitrator required to be appointed is one.

Learned Counsel for the respondent opposes such contentions.

Upon hearing learned Counsel, it is seen that the judgement cited by the petitioner on the appointment of arbitrator, in particular, *Perkins Eastman Architects DPC And Another (supra)* are apt and applicable here.

Moreover, in the present case, clause 18 of the agreement not only provides that the General Manager, South Eastern Railway, shall appoint the Arbitrator, it is qualified specifically in the next part of the sentence by the phrase “for the time being”, although the same is supplemented by the stipulation that his decision shall be final, conclusive and binding on the parties.

Upon a comprehensive reading of the entire sentence, it is clear that the appointment of Arbitrator by the General Manager, South Eastern Railway, would be final and conclusive and binding on the parties only ‘for the time being’. Thus, the binding and conclusive nature of such decision, even as per the clause itself, is tentative in nature since the same is qualified by the expression “for the time being”. That apart,

the law has been well settled in the judgment of *Perkins Eastman Architects DPC And Another (supra)* by the Supreme Court in that regard. Since the General Manager obviously has a conflict of interest as the person appointing arbitrator and as a functionary of one of the disputing parties, the 1996 Act prevents such a person from being given the charge of appointing Arbitrator.

In the present case, the dispute in question falls within the scope of arbitration clause and the arbitration clause is itself admitted and valid.

As such, AP No. 94 of 2023 is allowed.

Ms. Manju Bhuteria, a practising advocate of this Court is appointed as the Sole Arbitrator to resolve the disputes between the parties subject to declaration being obtained from her under Section 12 of the 1996 Act.

(SABYASACHI BHATTACHARYYA, J.)