

2023:PHHC:091740

**In the High Court for the States of Punjab and Haryana
At Chandigarh**

ARB-189-2019 (O&M)
Date of Decision:-18.7.2023

M/s A2Z Infra Engineering Limited ... Petitioner

Versus

Uttar Haryana Bijli Vitran Nigam ... Respondent

CORAM: HON'BLE MR. JUSTICE GURVINDER SINGH GILL

Present:- Ms. Ritika Gambhir Kohli, Advocate,
Mr. Nikhil Kohli, Advocate,
Ms. Kritika Khurana, Advocate and
Mr. Tushar Mudgil, Advocate for the petitioner.

Mr. Deepak Balyan, Advocate for the respondent.

GURVINDER SINGH GILL, J. (Oral)

1. The instant petition has been filed by the petitioner - M/s A2Z Infra Engineering Limited seeking appointment of an Arbitrator under provisions of Section 11 of Arbitration and Conciliation Act, 1996.
2. It is not disputed that the agreement/letter dated 29.9.2009 (Annexure P-1) specifically provides for arbitration as per "Conditions of Contract" (Annexure P-5), in case any dispute arises amongst the parties. Upon a dispute having arisen amongst the parties, the petitioner served a notice dated 26.11.2018 (Annexure P-22) invoking arbitration in accordance with Clause – 51 of the contract (Annexure P-5).

3. Learned counsel representing the respondent has, however, vehemently opposed the petition mainly on the ground that initially an attempt was required to be made for resolving the dispute before empowered officer in accordance with Clause 50.2 of the “Conditions of Contract” (Annexure P-5), which reads as under:

“50.2 If any dispute or difference of any kind whatsoever shall arise between the Owner and the Contractor, arising out of the Contract for the performance of the Works whether during the progress for the Works or after its completion or whether before or after the termination, abandonment or breach of the Contract, it shall, in the first place, be referred to and settled by the empowered officer to be appointed by the Owner, who, within a period of thirty (30) days after being requested by either party to do so, shall give written notice of his decision to the Owner and the Contractor.”

4. Another objection raised on behalf of the respondent pertains to Clause 51 of the Conditions of Contract (Annexure P-5), as per which, the Managing Director, UHBVN or his nominee is to act as Arbitrator. Said clause is reproduced hereinunder:

“51. All matters, question, disputes, differences and/or claims arising out of and/or concerning and/or in connection and/or in consequences or relating to this Contract whether or not obligations of either of both parties under this Contract be subsisting at the time of such dispute and whether or not this Contract has been terminated or purported to be terminated or completed, shall be referred to the Sole Arbitration of the MD, UHBVN or an Officer appointed by the MD, UHBVN as his nominee. The Award of the Arbitrator shall be final and binding on the parties to this Contract.

Subject to aforementioned provisions, the provisions of Arbitration & Conciliation Act, 1996 and the rules there under and statutory

modifications thereof for the time being in force, shall be deemed to apply to the Arbitration proceedings under the Clause.”

5. A perusal of both the above referred clauses would indicate that the same vitually provide for unilateral appointment of the empowered officer or the arbitrator by the Managing Director of the board itself, which is rather against the spirit of the judgment rendered in Perkins Eastman Architects DPC and another Versus HSCC (India) Limited, Law Finder Doc ID #1626194. The relevant extract reads as under:

“15. We thus have two categories of cases. The first, similar to the one dealt with in *TRF Ltd.* 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 authorized 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 Ltd'*, 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.

16. But, in our view that has to be the logical deduction from *TRF Ltd.* Para 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 (3 of 2016) and recognized by the decision of this Court in *TRF Ltd.*"
6. The ratio of *Perkins Eastman's case (supra)* leaves no manner of doubt that a person who himself has an interest in the dispute or the outcome of dispute would be ineligible not only act as an Arbitrator but such ineligibility would even extend to appointment of any Arbitrator by him in such matter. Thus, the clauses 50.2 and 51 of the contract, as reproduced above would not be capable of being implemented, being violative of dictum of *Perkins Eastman's case (supra)*.

7. Another objection that has been raised before this Court by the respondent pertains to limitation. However, this Court finds that the same would be a mixed question of law and fact and it shall be open to the respondent to take such objection before the Arbitrator. As such, the application under Section 11 of Arbitration and Conciliation Act, 1996 merits acceptance and is hereby accepted.
8. Keeping in view the fact that agreement/letter dated 29.9.2009 (Annexure P-1) specifically provides for resolution of the dispute by way of arbitration as per “Conditions of Contract” (Annexure P-5) and requisite notice (Annexure P-22) had been issued by petitioner, the present petition is allowed. Justice Tejinder Singh Dhindsa (Retd.) is appointed as the sole Arbitrator. However, such appointment would be subject to the declaration to be made by Justice Tejinder Singh Dhindsa (Retd.) under Section 12 of the Act with regard to his independence and impartiality to settle the disputes between the parties.
9. The Arbitrator shall be paid fee in accordance with the Fourth Schedule of the Act, as amended or as may be mutually settled by the parties and the Arbitrator.
10. As per agreement expressed by learned counsel for the parties, for the sake of the convenience of their respective clients, as also of the Arbitrator, the venue for the Arbitration shall be at Arbitration Centre, Chandigarh or at any other place convenient to all concerned.
11. After seeking convenience of the Arbitrator, the parties are directed to appear before him on 8.8.2023 at 11:00 A.M. or any other date suitable to all concerned.
12. A copy of this order be sent to the appointed Arbitrator at the given address :

House No. 123,
Sector 8, Chandigarh.
Mobile Nos.78370-49208 and 9815308888.

18.7.2023
pankaj

(Gurvinder Singh Gill)
Judge

Whether speaking /reasoned

Yes / No

Whether Reportable

Yes / No