



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P. (COMM.) 40/2018**

Date of Decision: 25/08/2023

IN THE MATTER OF:

**OM 360 DEGREES ADVERTISING AND ENTERTAINMENT PVT.
LTD.**

..... Petitioner

Through: Mr. Kapil Arora, Ms. Palak Nagar
and Ms. Anu Shrivastva, Advocates

versus

**DELHI METRO RAIL CORPORATION LIMITED
(DMRC)**

..... Respondent

Through: Mr. Tarun Johri and Mr. Vishwajeet
Tyagi, Advocates

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT (ORAL)

1. By way of present petition filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereafter, '*the A&C Act*'), the Petitioner has assailed the Award dated 29.09.2017, delivered by the Arbitral Tribunal comprising of a Sole Arbitrator (hereafter, '*the AT*').
2. The Arbitral proceedings arose in the context of a Contract awarded by the Respondent to the Petitioner/Claimant (hereafter, '*the Contractor*'). The parties entered into a contract for advertising rights inside 5 MRTS Stations of Line-3 Eastern Extension of MRTS Phase-II (Laxmi Nagar Station to Anand Vihar Station) (hereafter, '*the licensed sites*'). Resultantly,



a License Agreement dated 20.07.2010 was executed between the parties for an initial period of five years. Clause 29 of the General Terms and Conditions of the License Agreement provided for resolution of disputes through arbitration. Disputes having arisen, arbitral proceedings were initiated and the impugned Award was rendered.

DISPUTES BEFORE THE ARBITRAL TRIBUNAL

3. Contractor filed its Statement of Claims, wherein a total of 7 claims were filed. Vide Claim No.1, Contractor claimed that Bank Guarantee and Security Deposit provided by it, was wrongly forfeited. It thus claimed an amount of Rs.45,83,967/- towards the difference between the amounts forfeited and the amounts due from the Contractor to the Respondent. Claim No.2 was for seeking refund of Rs.54,31,927/- w.r.t the licence fee paid to the Respondent in lieu of 96 days when Contractor had no access to the licensed sites. Vide Claim No.3, Contractor claimed Rs.1 crores towards loss of revenue on account of failure of Respondent to issue timely permission to work on the licensed sites as well as non-cooperation of Respondent's and CRPF's security personnel. Claim No.4 sought compensation/damages to the tune of Rs.22,36,493/- on account of confiscation of its advertisement display material by the Respondent post termination. Vide Claim No.5, Contractor claimed an amount of Rs.3 lacs towards additional direct cost for miscellaneous and other incidental direct cost. Claim No.6 was for award of interest @ 18% per annum till payment of the claim amount of Rs.2,25,52,387 alongwith *pendente lite* interest. Lastly, cost of arbitration was also claimed.

4. Per contra, Respondent, apart from filing its Statement of Defence, filed 5 counter claims. Vide Counter Claim No.1, Respondent claimed



Rs.1,55,50,268/- towards the balance dues upto 16.10.2012. Vide Counter Claim No.2, a sum of Rs.34,31,914/- was claimed towards balance interest. Vide Counter Claim No.3, an amount of Rs.1,50,40,000/- was claimed towards unauthorised occupancy charges from 23.10.2012 to 24.11.2012. Vide Counter Claim No.4, Respondent claimed interest @ 18% per annum till payment of the claim amount of Rs.3,40,22,182/- alongwith *pendente lite* interest. Lastly, cost of arbitration was also claimed.

5. By the impugned Award, the AT, while dismissing the claims filed by the Contractor, allowed the Counter Claim Nos.1, 2 and 4.

SUBMISSIONS BEFORE THIS COURT

6. Contractor has raised a preliminary submission that the arbitral proceedings were vitiated inasmuch as the Arbitrator on the date of his appointment was a serving employee of the Respondent. The impugned Award is also assailed on other grounds.

7. Respondent, on the other hand, though does not dispute the aforementioned statement, submits that since the arbitral proceedings were initiated prior to the 2015 Amendment to A&C Act coming into force, thus it was the unamended Act which shall govern the procedure of the arbitral proceedings. While defending the nomination of the AT, it was submitted that merely because the Arbitrator happens to be an employee of the Respondent, that by itself would not render the appointment invalid and unenforceable.

8. Indisputably, the AT was unilaterally nominated by the Director of the Respondent in terms of Clause 29.1 of the License Agreement.

9. The issue raised here is no longer *res integra*. 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 apply to all judicial and quasi-judicial proceedings. The Supreme Court in Ellora Paper Mills Limited v. State of Madhya Pradesh, reported as (2022) 3 SCC 1, while emphasizing on the “neutrality of arbitrator”, noted that Sub-section (5) of Section 12 lays down that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject matter of the dispute falls under any of the categories specified in the Seventh Schedule, he shall be ineligible to be appointed as an arbitrator. It further held that Section 12(5) of the A&C Act, as amended by the 2015 Amendment Act, would be equally applicable to arbitral proceedings initiated prior to the coming into force of Amendment Act, 2015 as well.

10. There is no express waiver in writing by the Contractor waiving its right to the applicability of Sub-section (5) of Section 12. The present case relates to *de jure* ineligibility of the sole arbitrator. Indisputably, the learned Sole Arbitrator, while entering reference and delivering the Award, was a serving employee of the Respondent. The Supreme Court in Perkins Eastman Architects DPC v. HSCC (India) Ltd. reported as (2020) 20 SCC 760, held as under :-

“21. 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 shows 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 recognised by the decision of this Court in TRF Ltd.”

11. Recently, Supreme Court while dealing with a similar issue in Glock Asia-Pacific Ltd. vs. Union of India (UOI) reported as **2023 SCC OnLine SC 664** held as under:

“21. In contrast, the arbitration clause in the present case enables a serving employee of the Union of India, a party to the contract, to nominate a serving employee of the Union of India as the Sole Arbitrator. Such an authorisation is clearly distinct from the arbitration Clause in Voestalpine Schienen GmbH (supra) and Central Organisation of Railway Electrifications (supra), and is in conflict with Section 12(5) of the Act. It was informed at the bar that the correctness of judgement of Central Organisation of Railway Electrifications has been challenged and referred to a larger bench in Union of India v. M/s. Tania Constructions Ltd as well as JWS Steel Ltd. v. Southwestern Railways and Anr.. As we have noticed that the decision in Central Organisation of Railway Electrifications (supra) is not applicable in the present case, its reference to the larger Bench will have no



bearing on the outcome of the present case.”

12. Even, if the Contractor had participated in the arbitral proceedings and raised no objection to the appointment of the learned Sole Arbitrator, the same would neither amount to waiver of its right under Section 12(5) of the A&C Act nor make the Award valid. (Ref: Govind Singh v. Satya Group Pvt. Ltd. and Anr. reported as **2023 SCC OnLine Del 37**)

13. The law on the issue having been well settled, this Court has no hesitation to hold that the learned Arbitrator was *de jure* ineligible to act and lacked inherent jurisdiction to render the Award. The ineligibility goes to the root of his jurisdiction. The Award as such is held to be a nullity and is accordingly, set aside.

14. Since the preliminary issue has been decided in the affirmative, the other issues need not be delved into.

15. The petition is disposed of in above terms.

MANOJ KUMAR OHRI, J

AUGUST 25, 2023

ga