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

Date of Decision: 02nd February, 2023

+ O.M.P.(T)(COMM.) 92/2022

GUPTA BROS INDIA Petitioner

versus

THE PRESS TRUST OF INDIA LIMITED Respondent

+ O.M.P.(MISC.) 16/2022

THE PRESS TRUST OF INDIA LIMITED Petitioner

versus

MS GUPTA BROS INDIA Respondent

Appearance:-

Mr. S.K. Maniktala, Mr. Udit Maniktala, Mr. Jatin Kumar, Mr. Kritik & Ms. Reshma, Advocates for Gupta Bros India.

Mr. Abhik Kumar, Ms. Shweta Kapoor & Mr. Aslam Ahmed, Advocates for The Press Trust of India Limited. [M:- 9810138025]

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

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1. These two petitions arise out of arbitration proceedings which are in progress between the parties under a Contract Agreement dated 07.07.2014 [hereinafter, "the Contract"] by which The Press Trust of

India Limited [hereinafter, “PTI”] entrusted M/s Gupta Bros. (India) [hereinafter, “GBI”] with civil works at its office building in Jaipur.

2. GBI has filed O.M.P.(T)(COMM.) 92/2022 for termination of the mandate of the learned sole arbitrator and PTI has filed O.M.P.(MSIC.) 16/2022 for extension of the mandate. As the result of each petition is thus dependent on the result of the other, the petitions have been heard together and are disposed of by a common judgment.

O.M.P.(T)(COMM.) 92/2022

3. The Contract contains an arbitration clause [Clause 82.1]. The relevant part of the arbitration clause reads as follows:-

“82.1 Settlement of Disputes by Arbitration (other than mentioned in 82.2 below:

*Except where otherwise provided in the CONTRACT any question, dispute or difference that shall arise between OWNER on the one hand and the CONTRACTOR on the other hand as to the construction, intent, meaning or effect or the CONTRACT DOCUMENTS, drawings, specifications, estimates or any one of them or as to any further DRAWINGS to be prepared or as to the application of the SCHEDULE OF RATES, to the measurements taken or as to the materials or the quality thereof or as to execute the same whether arising during the progress of WORK, or within six (6) months of completion or abandonment thereof or as to any matter of thing, whether of the nature aforesaid or otherwise, however, arising out of or in any way relating to or connected with the CONTRACT then EVERY SUCH QUESTION, DISPUTE OR DIFFERENCE (except where otherwise herein expressly provided) **shall be referred to a SOLE ARBITRATOR to be appointed by the parties by mutual consent within one (1) month from the date of notice of either party requiring an arbitrator to be appointed or resolving such disputes. In the event of the parties being unable to agree to a sole arbitrator within the specified time, the sole arbitrator shall be appointed by the CHIEF EXECUTIVE OFFICER of the OWNER within one (1) month from the date of request made to him in this behalf by either party.** Such submission shall be deemed to be a submission to arbitration within the meaning of the INDIAN THE ARBITRATION AND CONCILIATION ACT*

1996 or any statutory notification thereof.”¹

4. Disputes having arisen between the parties, GBI invoked the arbitration clause by a communication dated 16.05.2018 addressed to the Chief Executive Officer [hereinafter, “CEO”] of PTI. As the parties to the Contract had failed to mutually agree upon the name of the sole arbitrator, GBI requested the CEO to act in terms of Clause 82.1 of the Contract.

5. A letter dated 13.06.2018 by the Chief Administrative Officer [hereinafter, “CAO”] of PTI addressed to the Managing Partner of GBI, stated as follows:-

“This is in response to and continuation of your letter dated May 16, 2018 to the Chief Executive Officer, Mr. Venky Venkatesh requesting for appointment of arbitrator in terms of clause 82.1 of the Works Contract for “Civil Structural, Architectural, Electrical Installations, Fire Protection/Detection Systems and Elevators Works” for the PTI office at Plot No. 5-B, Jhallan Doongri Institutional Area, Jaipur vide Letter of Award No. CAO-1057/14 dated June 16, 2014.

I have been instructed to inform you that as per your abovesaid notice subsequent to invoking the ‘Arbitration’, the matter is being referred to arbitration as mandated in the said clause.

We hereby appoint Ms. Sangeeta Sondhi, Advocate, having her office at C-633, New Friends Colony, New Delhi, **as the sole arbitrator** to adjudicate on the dispute in terms of the Works Contract. The date, time and venue of the arbitration proceedings shall be communicated by the arbitrator.”²

6. The learned arbitrator thereafter entered upon the reference, and I am informed that the proceedings are at the stage of final hearing before her. GBI made an application dated 12.07.2022, calling upon

¹ Emphasis Supplied.

² Emphasis Supplied.

the learned arbitrator to withdraw from the proceedings on two grounds. It was first contended that the appointment of the learned arbitrator by the CAO of PTI, rather than the CEO as required under Clause 82.1 of the Contract, rendered her appointment invalid. The second contention was that unilateral appointment of the arbitrator is impermissible *inter alia* in view of the judgments of the Supreme Court in *TRF Limited vs. Energo Engineering Projects Limited*³, *Perkins Eastman Architects DPC & Anr. vs. HSCC (India) Ltd.*⁴ and *Bharat Broadband Network Limited vs. United Telecoms Limited*⁵. The application was opposed by PTI, and ultimately rejected by the learned arbitrator by an order dated 01.09.2022. The learned arbitrator found that the application filed under Section 14 of the Arbitration & Conciliation Act, 1996 [hereinafter, “the Act”] was not maintainable before her.

7. Mr. S.K. Maniktala, learned counsel for the GBI, has reiterated the aforesaid two submissions relying upon the correspondence mentioned above and the aforesaid judgments of the Supreme Court.

8. Mr. Abhik Kumar, learned counsel for the PTI, submits that the relief sought by GBI is not maintainable at this stage. On the question of appointment of the learned arbitrator by the CAO instead of the CEO, Mr. Kumar submits that the appointment was, in fact, made by the CEO. He refers to a different letter dated 13.06.2018 addressed by the CAO of PTI to the learned arbitrator. The relevant paragraph of which reads as follows:-

³ (2017) 8 SCC 377.

⁴ (2020) 20 SCC 760.

⁵ (2019) 5 SCC 755.

*“Under instruction from the Chief Executive Officer of Press Trust of India Ltd., Mr. Venky Venkatesh, I, the Chief Administrative Officer has been directed to inform you that PTI has decided to appoint you as Arbitrator to conduct arbitration proceedings in order to resolve the dispute which has arisen on account of payment/non-payment towards the settlement of Full & Final Bill of a Contractor who had been awarded a Works Contract by PTI.”*⁶

This letter does not appear to have been copied to GBI and Mr. Maniktala states that GBI had no knowledge of it.

9. Mr. Kumar also draws my attention to a reference, in paragraph 2 of the learned arbitrator’s order dated 01.09.2022, to the hearing on 14.09.2018 wherein it is stated as follows:-

*“The counsel for the parties had given in writing no objection in the appointment of the undersigned as an arbitrator to adjudicate the present dispute between the parties”*⁷

Relying upon Section 4 of the Act, Mr. Kumar submits that GBI has waived its rights to object to the appointment of the learned arbitrator.

10. Having heard learned counsel for the parties, I am of the view that the present petition can be disposed of on Mr. Maniktala’s second contention with regard to the impermissibility of unilateral appointment of an arbitrator.

11. The judgments of the Supreme Court in *TRF*⁸ and *Perkins*⁹ make it clear that a person interested in the arbitration proceedings is neither entitled to act as an arbitrator, nor entitled to appoint an arbitrator unilaterally. The Supreme Court has so held on an interpretation of Section 12(5) of the Act. The proviso to Section 12(5)

⁶ Emphasis Supplied.

⁷ Emphasis Supplied.

⁸ Supra (note 3).

⁹ Supra (note 4).

of the Act, which provides for waiver from the provisions upon an express agreement in writing, has been considered in *Bharat Broadband*¹⁰, wherein the Supreme Court has held that such waiver cannot be implied by the conduct of parties, including participation in the arbitration proceedings.

12. These decisions have been considered by the Division Bench of this Court in two recent judgments, *Ram Kumar vs. Shriram Transport Finance Co. Ltd.*¹¹ and *Govind Singh vs. Satya Group (P) Ltd.*¹². In both the judgments, arbitral awards have been set aside under Section 34 of the Act *inter alia* on the reasoning that the ineligibility of a unilaterally appointed arbitrator goes to the root of his jurisdiction.

13. Regardless of whether the learned arbitrator was appointed by the CEO or CAO in the present case, the undisputed position is that she was unilaterally appointed by an officer of PTI. Mr. Kumar's argument, however, is based upon the ostensible consent accorded by GBI. In this connection, the order of the learned arbitrator dated 14.09.2018 mentions that learned counsel for the parties had given a no objection to her appointment in writing. Significantly, no copy of such a document has been produced before the Court by PTI. The context in which the no objection was given has been explained in the petition as follows:-

“7.9 That on 14.09.2018, the ld. Sole Arbitrator, giving declaration in terms of section 12 of the Act, informed that she was appointed by the respondent/PTI as a sole arbitrator in another case, which was settled in mediation. The claimant gave its no objection to the same. At that time, the claimant had no knowledge

¹⁰ Supra (note 5).

¹¹ 2022 SCC OnLine Del 4268.

¹² 2023 SCC OnLine Del 37.

that appointment of the Id. Sole Arbitrator by the CAO of the respondent as without any authority, and, as such, bad in law. Indeed, the claimant was given to understand that the CAO of the respondent was duly authorised and competent to do so. In any event, the said consent was context specific and the claimant never accepted the appointment of the sole arbitrator, by a person wholly unauthorized and/or incompetent and/or incapable and/or ineligible to do so. The said consent was typed in the office of the Id. Sole Arbitrator and, therefore, the claimant does not even have a copy of the same.¹³

In the reply to the aforesaid paragraph, PTI contends that the waiver by GBI was also with regard to appointment of the learned arbitrator by the CAO and not the CEO of PTI. There is no assertion that it constituted waiver by GBI from the provisions of Section 12(5) of the Act.

14. On the second aspect – as to the permissibility of unilateral appointment of the arbitrator – the reply of PTI only suggests that the aforesaid judgments of the Supreme Court are inapplicable. Mr. Kumar draws my attention to the judgment in *Central Organization for Railways Electrification vs. M/s ECI-SPIC-SMO-MCML(JV)*¹⁴ wherein the Court has held as follows: -

“38. In the present matter, after the respondent had sent the letter dated 27-7-2018 calling upon the appellant to constitute the Arbitral Tribunal, the appellant sent the communication dated 24-9-2018 nominating the panel of serving officers of Junior Administrative Grade to act as arbitrators and asked the respondent to select any two from the list and communicate to the office of the General Manager. By the letter dated 26-9-2018, the respondent conveyed their disagreement in waiving the applicability of Section 12(5) of the Amendment Act, 2015. In response to the respondent's letter dated 26-9-2018, the appellant has sent a panel of four retired railway officers to act as arbitrators giving the details of those retired officers and requesting the

¹³ Emphasis Supplied.

¹⁴ (2020) 14 SCC 712.

respondent to select any two from the list and communicate to the office of the General Manager. Since the respondent has been given the power to select two names from out of the four names of the panel, the power of the appellant nominating its arbitrator gets counterbalanced by the power of choice given to the respondent. Thus, the power of the General Manager to nominate the arbitrator is counterbalanced by the power of the respondent to select any of the two nominees from out of the four names suggested from the panel of the retired officers. In view of the modified Clauses 64(3)(a)(ii) and 64(3)(b) of GCC, it cannot therefore be said that the General Manager has become ineligible to act as (sic nominate) the arbitrator. We do not find any merit in the contrary contention of the respondent. The decision in TRF Ltd. is not applicable to the present case.”¹⁵

15. Although Mr. Maniktala points out that the judgment in *Central Organization*¹⁶ has itself been referred to a larger Bench, I am of the view that it is in any event, inapplicable to the facts of the present case, as this is not a case where a panel of potential arbitrators was suggested by PTI from which GBI could choose the arbitrator. The judgment in *Central Organization*¹⁷ distinguishes the ratio of *TRF*¹⁸ and *Perkins*¹⁹ on a ground that is thus plainly unavailable in the present case.

16. Mr. Kumar relies upon another judgment of the Coordinate Bench in *Kadimi International Pvt. Ltd. vs. Emaar MGF Land Limited*²⁰. Paragraph 21 of the aforesaid judgment reads as follows:-

“21. No doubt, Courts have now consistently proceeded to appoint an independent Arbitrator in situations where the arbitration clause is in conflict with the amended Arbitration Act. However, the unilateral right of party to appoint an Arbitrator has not been done away with. By way of Amendment Act of 2015, the

¹⁵ Emphasis Supplied.

¹⁶ Supra (note 14).

¹⁷ Ibid.

¹⁸ Supra (note 3).

¹⁹ Supra (note 4).

²⁰ 2019 SCC OnLine Del 9857.

legislature has not denuded or extinguished a contracting party's right to make an appointment. Only, the appointment of a person who is ineligible to be an Arbitrator under Section 12(5) read with Schedule VII of the Act has been held to be void and the objections regarding terms of contract being unfair or unreasonable would have to be gone into during the course of Arbitration. In TRF Ltd. (supra), the observations of the Court holding that the Managing Director to be ineligible to act as the Sole Arbitrator, has to be appreciated in the context of the arbitration clause therein. The judgment of Supreme Court in TRF Ltd. (supra) cannot be stretched or expanded so as to include such clauses that purely confer the right of appointment to one of the contracting parties.”²¹

17. The judgment in *Kadimi International*²² was rendered prior to the judgment of the Supreme Court in *Perkins*²³, wherein the Supreme Court held as follows: -

“20. 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 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 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

²¹ Emphasis Supplied.

²² Supra (note 20).

²³ Supra (note 4).

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 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 recognised by the decision of this Court in TRF Ltd.***²⁴

18. In view of the above, I am of the view that the unilateral appointment of the learned arbitrator by the officer of PTI, whether it was by the CAO or the CEO, is itself impermissible in law and the mandate of the learned arbitrator is therefore terminated.

19. It is made clear that no allegation of personal bias or *mala fides* have been made against the learned arbitrator and the present order is not intended to impute any such bias or *mala fides* to her.

20. For the aforesaid reasons, an independent arbitrator is also

²⁴ Emphasis Supplied.

required to be appointed. Hon'ble Mr. Justice A.K. Pathak, a former Judge of this Court [Tel: 9910389602] is appointed as the arbitrator with a request to take up the proceedings from the stage at which they were before the erstwhile arbitrator. Learned counsel for the parties agree that the arbitration may be held under the aegis of the Delhi International Arbitration Centre, Shershah Road, Delhi-110503 [hereinafter, "DIAC"] and will be governed by the Rules of the DIAC, including as to the remuneration of the learned arbitrator.

21. All rights and contentions of the parties are reserved.

22. The petition is disposed of with these directions with no order as to costs.

O.M.P. (Misc.) 16/2022

In view of the judgment passed in O.M.P.(T)(COMM.) 92/2022, this petition has been rendered infructuous and stands disposed of.

PRATEEK JALAN, J

FEBRUARY 02, 2023

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