



\$~54

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

Date of Decision: 21st November, 2023

+ **O.M.P. (T) (COMM.) 106/2023 & I.As. 23055-23056/2023**

RAIL VIKAS NIGAM LIMITED Petitioner

Through: Mr. Jitendra Kumar Singh, Ms. Harshita Singh and Ms. Anjali Kumari, Advocates.

versus

M/S DSC LTD - BEST & CROMPTON ENGINEERING PROJECT LTD. JV Respondent

Through: Mr. Sandeep Sethi, Senior Advocate with Mr. Deepak Khurana, Mr. Sumer Dev Seth and Ms. Shreya Sethi and Mr. Vineet Tayal, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J. (Oral):

1. The present petition under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 [*“the Act”*] seeks substitution/ reconstitution of the Arbitral Tribunal on the ground that at the time of appointing a substituted arbitrator, upon resignation of their nominee arbitrator, the Respondent has not acted in accordance with the envisaged procedure for appointment in terms of the arbitration agreement between the parties.

FACTS AND CONTENTIONS:

2. The factual backdrop leading to the filing of the present petition is as



follows:

2.1. The parties entered into a contract dated 26th May, 2008, for construction and infrastructure development in connection to doubling between Salka Road-Khongsara and Khodri-Anuppur Railways. Clause 20.3 thereof, as amended by Corrigendum dated 26th August, 2009, delineates an arbitration agreement [***“the Arbitration Clause”***] to the following effect:

“Arbitration – Any dispute in respect of which amicable settlement has not been reached shall be finally settled as set forth below: -

(i) In the case of dispute arising between the Employer and the Domestic or Foreign Contractor the disputes shall be settle in accordance with the Indian Arbitration Act, 1996 related to any matter arising out of or connected with this contract. Such dispute shall be referred to the Arbitral Tribunal consisting of (three) arbitrators, one each to be appointed as under: -

(a) Employer will forward a panel of 5 names to the contractor and contractor will give his consent for any one name out of the panel to be appointed as one of the Arbitrators.

(b) Employer will decide the second Arbitrator out of the remaining four names in the panel as mentioned is para (a) above,

(c) Third arbitrator shall be chosen by the two arbitrators so appointed by the parties and shall act as Presiding Arbitrator in case of failure of the two arbitrators, appointed by the parties to reach upon a consensus within a period of 30 days from the appointment of the arbitrators subsequently appointed then upon the request of either or both parties, the Presiding. Arbitrator shall be appointed by the Managing Director, Rail Vikas Nigam Limited, New Delhi. The Indian Arbitration and Conciliation Act, 1996 and any statutory modification or re-enactment thereof, shall apply to these arbitration proceedings.

It is further agreed between the parties that no person other than the persons appointed as per above procedure shall act as arbitrator.”

[sic.]

2.2. When disputes emerged between the parties, the Respondent (M/s DSC Ltd. – Best & Crompton Engineering Projects Ltd. JV) invoked the



jurisdiction of this Court under Section 11 of the Act [ARB.P. 505/2017]. After hearing the parties, the following order was passed on 21st February, 2018 [*“the Section 11 Order”*]:

“1. This is a petition filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'). The petitioner prays that an Arbitral Tribunal be constituted. The petitioner states that it has already nominated its arbitrator and an Arbitral Tribunal be constituted by appointing an arbitrator on behalf of the respondent and the presiding arbitrator.

...

3. Plainly, the procedure adopted by the petitioner in appointing its Arbitrator is not in accordance with the arbitration clause.

4. In terms of the aforesaid clause, the respondent has already furnished panel of five names to the petitioner. The learned counsel appearing for the respondent states that he would submit a fresh panel of at least thirteen persons. This would be forwarded to the petitioner within a period of one week from today. The learned counsel appearing for the parties concur that the petitioner would nominate one arbitrator out of the said panel within a period of one week thereafter. The respondent would also appoint one arbitrator from the said panel within a period of one week after receiving the petitioner's nomination. The said arbitrators would jointly concur on appointment of former Judge of this Court or the Supreme Court as the Presiding Arbitrator within a period of two weeks thereafter.

5. The said appointments shall be subject to the provisions of the Act.

6. All rights and contentions of the parties including as to the jurisdiction of the Arbitral Tribunal are reserved.

7. This order has been passed in view of the consensus arrived at between the parties.

8. The petition is disposed of.

9. Order dasti.”

[sic.]

2.3. In terms of the aforementioned order, the Arbitral Tribunal came to be constituted, comprising of the Petitioner's nominee, Mr. S.P.S. Jain, and the Respondent's nominee, Mr. S.K. Vijh. The two nominee arbitrators agreed



to appoint Mr. R.C. Chopra, former Judge of this Court, as the Presiding Arbitrator.

2.4. During the course of the arbitral proceedings, Mr. S.K. Vijn, resigned on 25th May, 2023. Pursuant thereto, on 30th May, 2023, the Respondent nominated Mr. G.S. Sistani, former Judge of this Court, to substitute Mr. S.K. Vijn.

2.5. The Petitioner raised an objection *qua* this substitution before the Arbitral Tribunal by way of application dated 18th July, 2023, claiming a breach of Section 15(2) of the Act, since the applicable appointment process had not been followed. However, this application was rejected by the Arbitral Tribunal *vide* order dated 28th August, 2023. In these circumstances, the present petition is filed impugning the said order and seeking termination of mandate and reconstitution of the Arbitral Tribunal.

PETITIONER'S CONTENTIONS:

3. Mr. Jitendra Kumar Singh, counsel for the Petitioner, raises the following contentions:

3.1. Section 15(2) of the Act clearly envisages that when the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed in accordance with the rules applicable to the appointment of the arbitrator being replaced. Thus, Respondent could not have unilaterally appointed a substitute nominee arbitrator as they were mandatorily required to follow the procedure as contemplated under the Arbitration Clause read with the Section 11 Order. Since the Respondent had not nominated a substitute arbitrator from the list of names suggested by the Petitioner, the appointment of Mr. G.S. Sistani is violative of Section 15(2) of the Act.



3.2. The original agreement required selection from the panel of five arbitrators suggested by the Petitioner, which was made thirteen as per the Court's Section 11 Order. Petitioner has, in fact, forwarded a list of ninety-four names to the Respondent, which provides a sufficiently broad-based panel for them choose from when appointing a nominee.

3.3. While rejecting the objections raised to the substitution, the Arbitral Tribunal has disregarded the judgment of the Supreme Court in ***Central Organisation for Railway Electrification vs. ECI-SPICSMO-MCML(JV)***¹ [**"CORE"**], solely on the ground that it has been referred to a larger Bench. However, the said judgement has not been set-aside and continues to be binding. It clearly upholds the right of parties to insist on the appointment to be made from the panel of arbitrators, as long as the arbitration agreement provides for the same.

3.4. A similar situation to the present case has been dealt with by this Court in ***M/S Raj Chawla and Co. Stock and share v. M/s Nine Media and information service Ltd. & Anr.***² Therein, the Court reiterated the Supreme Court's explanation in ***Yashwith Constructions (P) Ltd. v. Simplex Concrete Piles India Ltd.***³, that Section 15(2) of the Act mandates the appointment of a substituted arbitrator to be according to the rules contemplated for appointment at the initial stage.

RESPONDENT'S CONTENTIONS:

4. Mr. Sandeep Sethi, Senior Counsel for the Respondent, controverts the contentions of the Petitioner and submits the following:

¹ (2020) 14 SCC 712

² O.M.P.(T)(COMM.) 93/2022.



4.1. The Arbitral Tribunal's order dated 28th August, 2023, rejecting the Petitioner's application objecting to the appointment of Mr. G.S. Sistani, comprehensively considers the submissions advanced by the Petitioner and rightly concludes that there is no infirmity in the appointment procedure. Since the said order is non-appealable, the Petitioner cannot be permitted to subversively assail the Arbitral Tribunal's order by way of the instant petition.

4.2. The judgment in *M/S Raj Chawla (supra)* is inapplicable to the facts of the present case, distinguished on the basis of the stage at which intervention was sought by the Court. In the said case, the Petitioner had approached the Court seeking appointment of a substitute arbitrator immediately pursuant to the resignation of the Sole Arbitrator without appointing any substitute on their own accord. This is distinguished from the present case, as a substitute arbitrator has already been appointed, and his appointment has been upheld by the Arbitral Tribunal.

4.3. The position of the law on the issues being considered in the present case has evolved since the original Arbitration Clause was agreed upon by the parties. The authoritative decision of the Supreme Court *Perkins Eastman Architects DPC v. HSCC (India) Limited*⁴ ["Perkins"], has rendered the Arbitration Clause to be unenforceable, since it incorporates a unilateral procedure for appointment. Accordingly, there is no basis for the Petitioner to insist upon the appointments to be done from amongst their panel of arbitrators. In this regard, reliance is also placed on the judgment of

³ (2006) 6 SCC 204.

⁴ (2020) 20 SCC 760



this Court in *Pradeep Vinod Construction Co v. Union of India*⁵.

ANALYSIS AND FINDINGS:

5. In the present case, the request for termination of the mandate of the Arbitral Tribunal must be examined against the backdrop of relevant legal provisions and the specific directions issued by this Court in its previous orders. The key question is whether the conditions stipulated under Section 15 for termination are met, and how the Court's earlier orders under Section 11 influence this determination.

6. In terms of the Arbitration Clause, the Petitioner was to suggest a panel of five names, of which two were to be appointed as arbitrators. However, the Section 11 Order distinctly reveals a mutual decision by the parties to diverge from their original agreement in appointing an arbitrator. Specifically, the strength of the panel to be proposed by the Petitioner is expanded from five to thirteen, and the parties consented to appointing a retired judge of either this Court or the Supreme Court as the Presiding Arbitrator, a stipulation not reflected in the original Arbitration Clause. It is also pertinent to note that the Court did not appoint any arbitrator on its own accord, but rather, retained the right of parties to nominate their own arbitrators.

7. With this context in mind, a crucial question emerges — following the resignation of their nominee arbitrator, is the Respondent restricted from nominating an arbitrator who is not named in the panel proposed by the Petitioner? This question, in the opinion of this Court, must be answered in the negative. Although the provision for appointing from a panel was kept

⁵ (2023) SCC OnLine Del 179.



intact by the Section 11 Order, a nuanced analysis of the same would reveal that the objective of the Court was not merely to bind the parties to select from this enlarged list. Rather, the expansion given effect to by the Court reflects an inclination towards prioritising the Respondent's autonomy by providing more options to the parties, in order to ensure a more fair and balanced arbitral process.

8. In *Perkins*, the Supreme Court emphasises that the principles of fairness and impartiality are paramount to the arbitration process. The relevant excerpt thereof is extracted as follows:

*“21. But, in our view that has to be the logical deduction from TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] 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. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72]”*

[Emphasis Supplied]

9. From the aforesaid, it is evident that the Supreme Court has disentitled any party having an interest in the dispute from making the



appointment of an arbitrator. Moreover, although the Supreme Court anchors its analysis in the context of appointing a sole arbitrator, the same is premised on the understanding that in arbitration agreements wherein both parties are able to nominate respective arbitrators, no advantage would accrue to any single party. However, this premise falls apart in the context of the present case. Despite the Arbitration Clause providing for both parties to nominate their respective arbitrators, it does not extend an equal right to both parties. The Respondent's autonomy in appointing its nominee arbitrator is limited by the requirement for such appointment to be done from the specific panel proposed by the Petitioner. Such a restriction, while not unilateral *per se*, may give rise to a perception of bias, as the Petitioner, having an interest in the outcome of the dispute, is effectively empowered to dictate the terms of appointment for the Respondent's nominee. This is antithetical to the broader principle established in *Perkins*, i.e., a unilateral appointment process, even when seemingly sanctioned by an arbitration agreement, may not stand up to the scrutiny of fairness and impartiality.

10. Furthermore, while party autonomy is a cornerstone of arbitration, it is not absolute and must be balanced against the overarching need for a fair and impartial process. The *Perkins* judgment implicitly cautions against practices that might skew this balance, even if they are rooted in previously agreed-upon terms. The Court plays a key role in ensuring impartial arbitrator appointments, and in effect, upholding the integrity of the arbitration process. Thus, the Courts are not only entitled but obliged to intervene in scenarios where the appointment process might be compromised by justifiable doubts as to the independence and impartiality of an arbitrator.



11. Mr. Singh draws attention to the fact that the Petitioner has proposed a panel comprising ninety-four individuals, asserting that providing such a wide selection aligns with the broad-based criteria necessitated as per *Perkins*. However, the mere size of the panel does not conclusively address the concerns at hand in the present case. While a larger panel might suggest a range of choices, it is essential to consider other factors beyond mere numbers. The original arbitration clause stipulates a panel comprising only five names, a framework that would be applicable if Mr. Singh's arguments regarding the mandate of Section 15(2) are upheld. Furthermore, the Section 11 Order merely extends this panel to include thirteen individuals. Against this backdrop, the Petitioner's proposition of a significantly larger panel, consisting of ninety-four persons, appears to be a unilateral decision rather than a requirement stemming from any established legal or contractual framework. Consequently, this extensive list, though proposed by the Petitioner, lacks a foundation in the agreed-upon terms of the Arbitration Clause or the mandate of the Section 11 Order. Therefore, it cannot be deemed a relevant or applicable procedure for the appointment of a substitute arbitrator in the context of this case.

12. The critical issue before the Court is not the breadth or narrowness of the proposed panel, but rather the concern that the existing Arbitration Clause undermines the impartiality of the arbitration process. This is primarily due to its restrictive nature, which infringes upon the Respondent's autonomy in selecting an arbitrator of their choice. In this regard, Mr. Singh's reliance on the Supreme Court's judgement in *CORE (supra)*, is of no avail. It is pertinent to note that coordinate Benches of this Court have emphasised on the reasoning in *Voestalpine (supra)* to hold that a party



cannot be entitled to insist upon nomination from its pre-defined panel, as reflected in the following paragraph from ***Pradeep Vinod Construction (supra)***:

“13. In Voestalpine, the Supreme Court permitted appointment of an arbitrator from a broadbased panel to be suggested by one of the parties. The judgment of the Supreme Court in Central Organisation For Railway Electrification v. ECI-SPIC-SMO-MCML (JV) A Joint Venture Company, on the other hand, suggests that the appointment of an arbitrator from a panel submitted by one of the parties is by itself a valid procedure.

14. This Court, in two recent judgments, has had occasion to consider the present legal position on this aspect. The judgment in Gangotri Enterprises Ltd. v. General Manager, Northern Railways, deals with a clause very similar to the one with which we are concerned. Northern Railways, which is the respondent in the present case, was also the respondent in the said case. The Court held that the nomination of a four-member panel by Northern Railways could not be held to be a broadbased panel in terms of the judgment in Voestalpine and also rejected the argument of Northern Railways, based on the judgment in Central Organisation. In L&T Hydrocarbon Engineering Limited v. Indian Oil Corporation Limited, also, this Court has come to a similar conclusion, relying upon Voestalpine. In that case, both Voestalpine and Central Organisation were considered and it has been held that the respondent therein was not entitled to insist upon the nomination of an arbitrator from a panel of five names.

15. Having regard to the aforesaid judgments, I am of the view that the Union of India's insistence on appointment of the petitioner's nominee arbitrator from the panel of four names suggested by it, is impermissible.”

13. This Court concurs with the reasoning set out above. The role of the Court as a watchdog over the arbitration process necessitates an evaluation of the terms of the arbitration agreement against the touchstone of the principles of fairness and impartiality. Following the analysis encapsulated in the preceding paragraphs, the Petitioner cannot rely solely on the judgement in *CORE* to insist on appointment in terms of the original arbitration agreement.

14. Finally, reliance upon the decision in ***Raj Chawla*** is not tenable. Mr. Sethi correctly distinguishes this case by noting that, in ***Raj Chawla***, the Court was approached without adhering to the prescribed procedure for appointment as per the applicable rules at the time. The Court's comments



regarding the mandate of Section 15(2) of the Act pertained to Petitioner's failure to attempt substitution of the Sole Arbitrator as per agreed procedure prior to approaching the court. In contrast to ***Raj Chawla***, the present case involves different circumstances. Here, the issue is not just the bypassing of the established procedure for appointment, but rather concerns the infringement on the Respondent's autonomy and the potential compromise on the impartiality of the arbitration process due to the constraints imposed by the Arbitration Clause. Therefore, in light of this context, the Court's observations in ***Raj Chawla*** cannot be directly applied to justify Petitioner's stance in this case, as the fundamental legal questions and procedural circumstances differ significantly.

15. Further, in the absence of any specific facts which would affect the suitability of Hon'ble Mr. Justice Sistani's appointment, none of which have been raised by the Petitioner, this Court finds no reason to interfere with his appointment.

16. In view of the above, the Court does not find any merit in the present petition, the same is dismissed along with the pending applications.

SANJEEV NARULA, J

NOVEMBER 21, 2023

As

(corrected and released on 05th December, 2023)