

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

ARB-373-2023 (O&M)
Reserved on 29.10.2024
Pronounced on 05.11.2024

M/s Saumansh Infrastructure Private Limited ...Applicant

Versus

M/s Sepset Properties Private Limited ...Respondent

And

ARB-374-2023 (O&M)

M/s G.D. Buildtech Private Limited ...Applicant

Versus

M/s Sepset Properties Private Limited ...Respondent

CORAM: HON'BLE MR. JUSTICE JAGMOHAN BANSAL

Present: Mr. Avinash Trivedi, Advocate
Mr. Rhythm Nagpal, Advocate and
Mr. Abhimanyu Batra, Advocate for the applicant
Mr. J.S. Rana, Advocate for the respondent

JAGMOHAN BANSAL, J.

1. As common issues are involved in both the captioned applications, with the consent of parties, the same are hereby disposed of by this common order. For the sake of brevity and convenience, facts are borrowed from *ARB-373-2023*.

2. Through instant application under Section 11 read with Section 14 and 15 of the Arbitration and Conciliation Act, 1996 (for short '1996

Act'), the applicant is seeking appointment of an Arbitrator and termination of mandate of Arbitrator appointed by the respondent.

3. The applicant and respondent are Limited Companies registered under the Companies Act, 1956. The respondent is engaged in the business of building and developing housing projects. It, with respect to its residential complex named as Paras Dew's at Gurgaon-Dwarka Expressway, Sector 106, Gurugram, awarded a contract to the applicant. The job of the applicant was to execute civil and structural work. The value of the contract was ₹16,32,89,461/-. An agreement dated 13.06.2014 was executed between the parties. After the said agreement dated 13.06.2014, the parties entered into Work Order Agreements dated 30.05.2015 and 06.08.2015.

4. The applicant claims that it has completed allotted works within time scheduled and to the utmost satisfaction of the respondent. It submitted final bills but respondent did not make payment. The applicant sent letter dated 17.12.2022 but respondent did not pay any heed. The applicant served legal notice dated 13.02.2023 in terms of Clause 15 of the agreement which prescribes mechanism for settlement of dispute. The respondent, in response to notice dated 13.02.2023 of the applicant, vide letter dated 04.03.2023 intimated appointment of Sh. V.K. Maheshwari, Principal Judge, Family Court (Retired) as a Sole Arbitrator to adjudicate the disputes.

5. The applicant vide application dated 17.04.2023 under Section 16 of 1996 Act requested the Arbitrator not to proceed with the matter. The ground of filing said application was that respondent has made unilateral appointment of the Arbitrator.

6. The Arbitrator vide e-mail dated 21.04.2023 sent first proceeding to the applicant and fixed the matter for 15.05.2023. The applicant preferred application *ARB No.241 of 2023* under Section 11 read with Sections 14 and 15 of 1996 Act before this Court. The said application was withdrawn on 29.05.2023 with liberty to avail remedies in accordance with law.

7. The applicant requested the Arbitrator to decide its application challenging constitution of the Tribunal. The Arbitrator asked the respondent to file its reply and the matter was fixed for 06.07.2023. The Arbitrator adjudicated application filed under Section 16 of 1996 Act vide order dated 13.07.2023. The Arbitrator dismissed the application and upheld his appointment. Feeling aggrieved from the order passed by the Arbitral Tribunal, the applicant has filed the instant application seeking appointment of an Arbitrator in terms of Section 11 read with Sections 14 and 15.

8. Mr. Avinash Trivedi, learned counsel for the applicant submits that respondent has made unilateral appointment of a Sole Arbitrator. The said appointment is contrary to mandate of Sections 11 and 12 of 1996 Act. A party to contract cannot make unilateral appointment. Consent of both sides is mandatory. This Court in exercise of power conferred by Section 11 can set aside appointment made by one party and make appointment of an independent Arbitrator. Independence and impartiality are two pillars of adjudication by an Arbitrator. The appointment made by the respondent cannot be treated as appointment of an independent and impartial Arbitrator. The applicant has no doubt about the independence, integrity or competence of the Arbitrator who is a Retired Judicial Officer, however, unilateral

appointment made by the respondent is not just and fair and is contrary to Section 12.

9. In response to a query of the Bench, Mr. Avinash Trivedi, submitted that this Court in terms of judgments of Supreme Court in ***TRF Limited v. Energo Engineering Projects Limited, (2017) 8 SCC 377*** and ***Perkins Eastman Architects DPS and others v. HSCC (India) Ltd., (2020) 20 SCC 760*** can make appointment under Section 11 of 1996 Act despite order passed by Arbitrator under Section 16 of 1996 Act. This Court can ignore appointment made by the respondent and make fresh appointment of an Arbitrator.

10. *Per contra*, Mr. J.S. Rana, learned counsel for the respondent submits that as per arbitration agreement, the respondent has authority to make appointment of a Sole Arbitrator. The respondent has rightly made appointment of the Sole Arbitrator. The appointed Arbitrator has furnished declaration under Section 12(5) and he is a Retired Judicial Officer, thus, there is no question to invoke jurisdiction of this Court under Section 11 of 1996 Act. The applicant, on a previous occasion, withdrew its petition with liberty to avail remedies as permissible by law. It filed application before the Arbitrator under Section 16 of 1996 Act. The said application was dismissed by a detailed order passed by the Arbitrator. This Court cannot set aside order passed by the Arbitrator under Section 16.

11. I have heard the arguments of learned counsel for both sides and perused the record with their able assistance.

12. The conceded position emerging from the record is that the parties entered into different agreements including Work Order Agreement dated 30.05.2015. A dispute erupted between the parties. The applicant served legal notice upon the respondent who in turn appointed a Sole Arbitrator. The applicant objected appointment of the said Arbitrator. It filed petition under Section 11 read with Sections 14 and 15 of 1996 Act before this Court which was dismissed as withdrawn with liberty to avail remedies in accordance with law. The applicant again approached the Arbitrator and questioned validity of appointment of the Arbitrator. The Arbitrator rejected application of the applicant under Section 16. The applicant has filed fresh application under Section 11 read with Sections 14 and 15 of the 1996 Act.

13. The parties entered into different contracts including Work Order Agreement dated 30.05.2015. The arbitration clause which formed part of aforesaid Work Order Agreement is reproduced as below:

“Settlement of Disputes: Any dispute arising out of this work order shall be settled as per terms & conditions of this work order. In case of failure to settle amicably, the dispute shall be finally resolved in accordance with the Arbitration & Conciliation Act, 1996 by sole Arbitrator to be nominated (including nomination of replacement Arbitrator, if necessitated by vacancy of the post caused by any reason whatsoever) by the Client. The venue of arbitration shall be Gurgaon. This sub contract is governed as per the Laws of India and the jurisdiction of only Gurgaon Courts shall apply.”

14. From the perusal of above quoted clause, it is evident that the parties have agreed to resolve their disputes through a Sole Arbitrator to be nominated by the client (respondent). The applicant is objecting appointment

on the sole ground that the respondent has made unilateral appointment and said appointment is contrary to Section 12(5) read with judgments of Supreme Court in *TRF Limited (supra)* and *Perkins Eastman (supra)*.

15. The Supreme Court in *Indian Oil Corporation Limited v. Raja Transport (P) Limited, (2009) 8 SCC 520* has adverted to scope and reach of Section 11 of 1996 Act. The relevant extracts of the judgment are reproduced as below:-

“48. In the light of the above discussion, the scope of Section 11 of the Act containing the scheme of appointment of arbitrators may be summarised thus:

(i) Where the agreement provides for arbitration with three arbitrators (each party to appoint one arbitrator and the two appointed arbitrators to appoint a third arbitrator), in the event of a party failing to appoint an arbitrator within 30 days from the receipt of a request from the other party (or the two nominated arbitrators failing to agree on the third arbitrator within 30 days from the date of the appointment), the Chief Justice or his designate will exercise power under sub-section (4) of Section 11 of the Act.

(ii) Where the agreement provides for arbitration by a sole arbitrator and the parties have not agreed upon any appointment procedure, the Chief Justice or his designate will exercise power under sub-section (5) of Section 11, if the parties fail to agree on the arbitration within thirty days from the receipt of a request by a party from the other party.

(iii) Where the arbitration agreement specifies the appointment procedure, then irrespective of whether the arbitration is by a sole arbitrator or by a three-member Tribunal, the Chief Justice or his designate will exercise

power under sub-section (6) of Section 11, if a party fails to act as required under the agreed procedure (or the parties or the two appointed arbitrators fail to reach an agreement expected of them under the agreed procedure or any person/institution fails to perform any function entrusted to him/it under that procedure).

(iv) While failure of the other party to act within 30 days will furnish a cause of action to the party seeking arbitration to approach the Chief Justice or his designate in cases falling under sub-sections (4) and (5), such a time-bound requirement is not found in sub-section (6) of Section 11. The failure to act as per the agreed procedure within the time-limit prescribed by the arbitration agreement, or in the absence of any prescribed time-limit, within a reasonable time, will enable the aggrieved party to file a petition under Section 11(6) of the Act.

(v) Where the appointment procedure has been agreed between the parties, but the cause of action for invoking the jurisdiction of the Chief Justice or his designate under clauses (a), (b) or (c) of sub-section (6) has not arisen, then the question of the Chief Justice or his designate exercising power under sub-section (6) does not arise. The condition precedent for approaching the Chief Justice or his designate for taking necessary measures under sub-section (6) is that

(i) a party failing to act as required under the agreed appointment procedure; or

(ii) the parties (or the two appointed arbitrators) failing to reach an agreement expected of them under the agreed appointment procedure; or

(iii) a person/institution who has been entrusted with any function under the agreed appointment procedure, failing to perform such function.

(vi) The Chief Justice or his designate while exercising power under sub-section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.

(vii) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else.”

16. From the perusal of above quoted para, it is evident that power under Section 11(6) can be exercised by the High Court where a party has failed to act as required under the agreed appointment procedure or the parties (or the two appointed Arbitrators) have failed to reach an agreement expected of them under the agreed appointment procedure or a person/institution who has been entrusted with any function under the agreed appointment procedure has failed to perform such function. The High Court while exercising power under Section 11(6) shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause. It means the factor which must weigh in mind of the Court is “procedure prescribed in the arbitration clause”.

In the case in hand, procedure has been prescribed for the appointment of the Arbitrator. As per prescribed procedure, there would be a Sole Arbitrator who would be nominated by the client i.e. respondent. The client-respondent on account of dispute raised by the applicant has made

appointment of a Sole Arbitrator. The said Arbitrator in terms of Section 12(5) has brought on record declaration disclosing that he is neither directly nor indirectly connected with parties or the subject matter. The applicant is not disputing integrity or impartiality of the Arbitrator. Sole objection of the applicant is that respondent has made unilateral appointment. The applicant has heavily placed reliance upon judgments of Supreme Court in ***TRF Limited (supra)*** and ***Perkins Eastman (supra)***. In ***TRF Limited (supra)***, as per arbitration clause, Managing Director or his nominee could be Sole Arbitrator. The appointment of Managing Director as Arbitrator was contrary to statutory provision, thus, he was ineligible. The Supreme Court relying upon its earlier judgment in ***State of Orissa v. Commissioner of Land Records & Settlement, (1998) 7 SCC 162*** and ***Roop Chand v. State of Punjab, AIR 1963 SC 1503*** concluded that delegatee of the State Government is equal to State Government, thus, delegatee of Managing Director is equal to Managing Director. The Managing Director became ineligible in terms of Section 12(5), thus, he could not nominate a person. It is inconceivable in law that a person who is statutorily ineligible can nominate a person. The concluding part of the judgment is reproduced as below:

“54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per

prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view [TRF Ltd. v. Energo Engg. Projects Ltd., 2016 SCC OnLine Del 2532] expressed by the High Court is not sustainable and we say so.”

17. In ***Perkins Eastman (supra)***, the Court considered two categories of cases. The first, similar to one dealt in ***TRF Limited (supra)*** i.e. where the Managing Director himself is nominated as an Arbitrator with an additional power to appoint any other person as an Arbitrator and second, where the Managing Director is not to act as Arbitrator but is empowered or authorized to appoint any other person of his choice or discretion as an Arbitrator. The Court observed that if test applied to first category of cases is applied to second category of cases, in all cases 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. The Court further observed that in ***TRF Limited (supra)***, ineligibility was a result of operation of law and it was held that a person who is ineligible to act as an Arbitrator cannot make appointment of another Arbitrator. A person who has an interest in the outcome or decision of the Tribunal must not have power to appoint a Sole Arbitrator. The Court can make appointment in exercise of power under Section 11(6) if there are justifiable doubts as to the independence and impartiality of the person

nominated or if other circumstances warrant appointment of an independent Arbitrator by ignoring procedure prescribed. The Law Commission in its Report No.246 has also opined that even where State has power to make appointment of adjudicator, the duty to appoint an impartial and independent adjudicator is much more onerous and mere prior agreement between the parties at the time of contract cannot be said to have waived off right of natural justice.

Unless the appointment of the Arbitrator is *ex facie* valid and such appointment satisfies the Court exercising jurisdiction under Section 11(6), acceptance of such appointment as a *fait accompli* to debar the jurisdiction under Section 11(6) cannot be countenanced in law. The Court concluded that if there are justifiable doubts as to independence and impartiality of the person nominated or other circumstances warrant, the Court can make appointment of an independent Arbitrator and ignore the agreed procedure.

18. In the case in hand, the applicant on the earlier occasion filed identical application i.e. *ARB No.241 of 2023* before this Court which was withdrawn with liberty to avail remedies in accordance with law. The applicant approached Arbitrator and raised question of unilateral appointment. The Arbitrator adjudicated application of the applicant filed under Section 16 of 1996 Act. The application was dismissed. This Court cannot sit over said decision of Arbitrator as Appellate Court and set aside the same while exercising power under Section 11(6).

19. The applicant has filed instant application raising same issues and on the same grounds which were part of earlier application i.e. *ARB No.241 of 2023*. The said application was dismissed as withdrawn and there is no reason to entertain second application on the same set of facts and circumstances. There is no change in the factual or legal position warranting interference.

20. In the arbitration clause, procedure has been prescribed. The respondent has made appointment as per procedure. In the absence of violation of procedure, there is no manifest reason to entertain instant application.

21. The Arbitrator has furnished declaration in terms of Section 12(5) of 1996 Act. The applicant is not doubting integrity or impartiality of the Arbitrator. In the absence of justifiable doubt as to the independence and impartiality of the Arbitrator, this Court cannot ignore appointment made as per procedure and further make appointment of an Arbitrator in terms of Section 11(6). The Supreme Court neither in *TRF Limited (supra)* nor in *Perkins Eastman (supra)* has held that appointment of the Arbitrator by one party to the agreement should be ignored irrespective of absence of doubt as to impartiality and integrity or violation of Section 12(5). In the instant case, neither there is doubt as to integrity or impartiality of the Arbitrator nor violation of Section 12(5) read with 5th and 7th Schedule of 1996 Act. In the absence of justifiable reason, appointment of the Arbitrator, made in accordance with arbitration clause, cannot be set aside.

22. In the wake of above discussion and findings, this Court is of the considered opinion that there is no reason to invoke power conferred by Section 11(6) of the Arbitration and Conciliation Act, 1996 and supersede appointment of Sole Arbitrator made by respondent. The applications san merit, thus, deserve to be dismissed and accordingly dismissed.

23. Pending application(s), if any, shall stand disposed of.

(JAGMOHAN BANSAL)
JUDGE

05.11.2024
Mohit Kumar

Whether speaking/reasoned	Yes
Whether reportable	Yes