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

+ **ARB.P. 383/2024**

AMARDEEP BUILDERS

..... Petitioner

Through: Ms.Stuti Jain, Mr. Akshu Jain and
Ms. Vishwa Bharti, Advs.

versus

DELHI DEVELOPMENT AUTHORITY

..... Respondent

Through: Mr. Sanjay Vasishsta, Adv.(VC)

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

ORDER

09.04.2024

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1. The present petition has been filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (hereinafter, referred to as the "A&C Act"), seeking appointment of independent and impartial arbitrator, to adjudicate the disputes between the parties. The parties had entered into an agreement dated 18.05.2017.
2. Learned counsel for the petitioner submits that after having disputes arisen between the parties, the respondent appointed Sh. Dhanesh Gupta, as sole arbitrator to adjudicate the disputes. Learned counsel for the petitioner submits that after the completion of pleadings, it came to the notice that the learned Arbitrator has not disclosed the correct information as required in accordance with Section 12 of the A&C Act. Learned counsel has challenged the appointment of Sh. Dhanesh Gupta on following grounds:



- a. The learned Sole Arbitrator was appointed by the DDA unilaterally and therefore, in view of the judgment of ***Perkins Eastman Architects V. HSCC (India) Limited*** (2020) 20 SCC 760 and ***JMC Projects (India) Ltd. v. Indure Private Limited*** 2020 SCC OnLine Del 1950 such appointment is *non est*.
 - b. The learned Sole Arbitrator has given false information that he had no previous relation with the respondent/DDA whereas it came on the record that the learned Arbitrator had earlier also been appointed as an arbitrator in the cases involving the DDA.
 - c. The learned Sole Arbitrator by his conduct in condoning the delay on the part of the respondent/DDA has made himself illegible to continue as an arbitrator.
3. Learned counsel for the DDA has submitted that the petitioner has not fully disclosed the facts before this Court. Learned counsel submits that the respondent vide its communication dated 30.06.2023 has requested that Sh. Dhanesh Gupta (Retd.) CE/TSP, Northern Railway may be considered for the above-said arbitration.
 4. Learned counsel further submits that therefore the present case does not fall within the category of unilateral appointment. Learned counsel has further submitted that merely because Sh. Dhanesh Gupta has been an arbitrator in which the DDA was also a party will not make him ineligible for appointment as an arbitrator. Learned counsel submitted that bias or misconduct as alleged by the petitioner is baseless.
 5. Learned counsel for the respondent has submitted that in the present case, the arbitration/arbitrator was not appointed by the Engineer,



Member, DDA. The arbitrator was appointed only after the petitioner consented to appoint Mr. Dhanesh Gupta as arbitrator and therefore this petition is liable to be dismissed.

A. Unilateral Appointment

6. Learned counsel for the petitioner has submitted that in a catena of cases including *TRF Ltd. v. Energo Engineering Projects Ltd.* (2017) 8 SCC 377, *Perkins* (supra), *Bharat Broadband Network Limited v. United Telecoms Limited* (2019) 5 SCC 755, it has repeatedly been held that unilateral appointment of an arbitrator is illegal and *non est*. Learned counsel has further submitted that the respondent vide its communication dated 12.06.2023, had suggested the name of the five arbitrators as per clause 25 of the agreement and the petitioner merely agreed to one of them.
7. Learned counsel submits that the panel being proposed by the arbitrator was not broad-based and is therefore in violation of the *Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd.* 2017 SCC OnLine SC 172. Learned counsel has also relied upon *Kalyan Toll Infrastructure Ltd. v. Union of India* in ARB. P. 1243/2023 dated 05.03.2024 wherein the judgment of *Voestalpine* (Supra) was followed by this Court. Learned counsel has further submitted that in *JMC Projects (India) Ltd. v. Indure Private Limited* 2020 SCC OnLine Del 1950, Coordinate Bench of this Court has specifically inter alia held that there has to be “express agreement in writing” for waiving the applicability of Section 12(5). Learned counsel submits that no conduct howsoever extensive and suggestive can substitute the “express agreement in writing”.



8. Learned counsel therefore submits that merely because the petitioner had agreed to the appointment of an arbitrator, the appointment of Sh. Dhanesh Gupta as an arbitrator by the respondent cannot be held valid in the eyes of the law. Learned counsel has also relied upon ***Govind Singh v. Satya Group Pvt. Ltd. and Another*** 2023 SCC OnLine Del 37.
9. I consider that the law is very well settled and it is no longer *res Integra* that the unilateral appointment of arbitrator is *non est*. A party is totally debarred from appointing an arbitrator unilaterally. This has come up for discussion before the Apex Court and various benches of this Court in numerous judgments. The Supreme Court in ***Central Organization for Railway Electrification v. ECI-SPIC-SMO-MCMI (JV) (CORE)***, considered the broad propositions regarding the appointment of an arbitrator from a panel and same was upheld. However, in the ***Voestalpine*** (supra) case, it was inter alia held that such a panel has to be a broad-based panel. The ***CORE*** (Supra) judgment was considered by this Court in ***Margo Networks Pvt. Ltd & Anr. v. Railtel Corporation of India Ltd.*** in Arb. P. 637/2023, it has been inter alia held as under:

“35. Thus, in an appointment procedure involving appointment from a panel made by one of the contracting parties, it is mandatory for the panel to be sufficiently broad based, in conformity with the principle laid down in 2022/DHC/004531 *Voestalpine* (supra), failing which, it would be incumbent on the Court, while exercising jurisdiction under Section 11, to constitute an independent and impartial Arbitral Tribunal as mandated in TRF (supra) and Perkins (supra). The judgement of the Supreme Court in *CORE* does not alter the position in this regard.



36. In the facts of the present case, applying the principles laid down in Voestalpine (supra) and in view of the aforesaid judgments of this Court, including in L&T Hydrocarbon Engineering Limited (supra), it is evident that the panel offered by the respondent to the petitioner in the present case is restrictive and not broad based. The same adversely impinges upon the validity of the appointment procedure contained in clause 3.37 (supra), and necessitates that an independent Arbitral Tribunal be constituted by this Court.”

10. The same proposition was followed by this Court in **Kalyan Toll** (supra) and in many other cases which are being not referred to herein as the point is well settled. It is also pertinent to mention that while following a precedent the Court has to read the judgment textually and contextually. The facts and circumstances of each case have to be taken into account before following a judgment. There is quarrel to the settled proposition that unilateral appointment of sole arbitrator is bad in law. It is also well settled proposition that primarily panel has to be broad-based. It is also settled that merely because a person has been an employee of Union of India does not disentitle and there cannot be any occasion for this Court to deviate from these propositions.

11. In the present case, clause 25 of the agreement deals with the settlement of disputes and arbitration. This Clause confers the power on Engineer member, DDA for appointment of Sole Arbitrator. Undoubtedly, on the face of it, such a clause cannot stand scrutiny of law. It is correct that the DDA sent a communication dated 12.06.2023, in response to the letter of the petitioner dated 22.05.2023, suggesting a panel of five arbitrators for appointment of the arbitrator including the name of Sh. Dhanesh Gupta, the present



sole arbitrator. However, such a panel by no stretch of imagination can be termed as broad based.

12. The plea of the learned counsel for the respondent that the petitioner consented to one of such names and therefore it is not a case of unilateral appointment cannot be accepted. It is also without merit that for this reason, the present case comes out of the purview of the unilateral appointment. There was no fair choice with the petitioner. The neutrality and impartiality of such panel also cannot pass the acid test.
13. It has repeatedly been held that such clauses giving power of unilateral appointment to one of the parties is bad and *non est* in law. It is also a matter of the record that no panel has been furnished by the DDA which could assist the Court in finding out that whether these five names were out of any such broad based names. The question is if the clause itself is bad in law, can the operation of the same in any manner be sustained. The fact of petitioner consenting to one of the name will not make any difference. Suppose, in pursuance to such clause an arbitrator is appointed unilaterally, and the other party join the proceedings, can such other be held debarred in future from challenging such unilateral appointment. Even the award being passed by such an arbitrator are set aside as it hits upon the core of concept of the neutrality.
14. I consider that nothing more should detain this Court from declaring clause-25 (a) (ii) as *non est* in conformity with the judgment of **Perkins** (Supra) judgment. Hence, the appointment of Mr. Dhanesh Gupta is declared invalid and hence the sole arbitral tribunal is



terminated. However, it is made clear that this Court has not gone into the question of non-compliance with Section 12(5) of the A&C Act with regard to the conduct of the arbitrator as it is not required.

15. In these circumstances, the present petition is disposed of with the following directions:

- A. Justice Mukta Gupta, Former Judge of the High Court of Delhi (Mob. 9650788600) is appointed as Sole Arbitrator to adjudicate upon the disputes in between the parties.
- B. The arbitration will be held under the aegis of the Delhi International Arbitration Centre (Delhi High Court, Sher Shah Road, New Delhi hereinafter, referred to as the 'DIAC'). The remuneration of the learned Arbitrator shall be in terms of fee rules of the DIAC Schedule or as the parties may agree.
- C. The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.
- D. It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claims, any other preliminary objection, as well as claims on merits of the dispute of either of the parties, are left open for adjudication by the learned arbitrator.
- E. The parties shall approach the learned arbitrator within two weeks from today.

DINESH KUMAR SHARMA, J

APRIL 9, 2024

Pallavi