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

Date of Decision: 15.07.2024

+ **ARB.P. 76/2024, I.A. 1481/2024**

MRS. PRABHA MANDAL

.....Petitioner

Through: Mr. Utkarsh Singh, Mr. Md. Tauheed
Arshi, Mr. Mohd. Humaid, Advs.

versus

WTC, NOIDA DEVELOPMENT COMPANY PVT. LTD. & ANR.

.....Respondent

Through: Mr. Shaunak Kashyap, Adv.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

: **JASMEET SINGH, J (ORAL)**

1. This is a petition under section 11(6) of the Arbitration and Conciliation Act, 1996 seeking appointment of an Arbitrator to adjudicate the disputes between the petitioner and the respondent.
2. The petitioner entered into an agreement dated 22.12.2018 with the respondents for a commercial space, i.e. B-06-17b, 6th Floor, Tower-B, WTC NOIDA CBD, Plot bearing No. A02/1, Sector 132, Noida, District Gautam Budh Nagar. It was agreed that the possession would be given by 27.02.2024 and a monthly return will be given till the petitioner received possession.
3. The petitioner made the payments as per the agreement. Since the respondent did not comply with their part of the obligations, the petitioner invoked arbitration *vide* legal notice dated 06.07.2023 in terms of clause 36



of the agreement, which reads as under:

“36. DISPUTE RESOLUTION:

All or any disputes arising out or in relation to the terms and condition of this Agreement, including the interpretation and validity of the terms thereof and the respective rights and obligations of the Parties, shall be settled amicably by mutual discussion, failing which efforts shall be made for settlement through the process of mediation with assistance of any reputed mediation with assistance of any reputed mediation centres (like Mediation Centre at Allahabad High Court, Mediation Centre at Gujarat High Court etc.) situated either at New Delhi or at place where project is situated and at no other place. In case dispute remains unresolved even after mediation same shall be settled through the mechanism of Arbitration as provided under The Arbitration and Conciliation Act, 1996. Arbitrator shall be appointed by Promoter. Cost of Arbitration shall be borne by both the parties. Seat and Venue of Arbitration shall be at New Delhi. Subject to the aforesaid mechanism of arbitration, unresolved disputes shall be settled through adjudicating officer appointed under the Act.”

4. The petitioner referred the matter to the Delhi High Court Mediation but the respondent failed to appear. Since the disputes were not settled, the petitioner filed the present petition.
5. Notice was issued and despite opportunity, no reply has been filed.
6. Mr. Kashyap, learned counsel appearing for the respondent has argued that under clause 36 of the agreement, it is the promoter who is to appoint an Arbitrator.
7. He states that for the said reason, this court should not exercise its power under Section 11(6) of the Arbitration and Conciliation Act, 1996 and should leave it to the respondent to appoint the Arbitrator.
8. He relies on the judgment of the Hon'ble Supreme Court in ***Central Organisation for Railway Electrification vs. ECI-SPIC-SMO-MCML (JV)***



A Joint Venture Company, (2020) 14 SCC 712, more particularly on paras 38, 39 and 40. It reads as under:

“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 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.

39. There is an express provision in the modified clauses of General Conditions of Contract, as per Clauses 64(3)(a)(ii) and 64(3)(b), the Arbitral Tribunal shall consist of a panel of three gazetted railway officers [Clause 64(3)(a)(ii)] and three retired railway officers retired not below the rank of Senior Administrative Grade Officers (Clause 64(3)(b)]. When the agreement specifically provides for appointment of the Arbitral Tribunal consisting of three arbitrators from out of the panel of serving or retired railway officers, the appointment of the arbitrators should be in terms of the



agreement as agreed by the parties. That being the conditions in the agreement between the parties and the General Conditions of the Contract, the High Court was not justified in appointing an independent sole arbitrator ignoring Clauses 64(3)(a)(ii) and 64(3)(b) of the General Conditions of Contract and the orders cannot be sustained.

40. In the result, the impugned orders dated 3-1-20191 and 29-3-20192 passed by the High Court of Judicature at Allahabad in Arbitration Application No. 151 of 2018 are set aside and these appeals are allowed. The appellant is directed to send a fresh panel of four retired officers in terms of Clause 64(3)(b) of the General Conditions of Contract within a period of thirty days from today under intimation to the respondent contractor. The respondent contractor shall select two from the four suggested names and communicate to the appellant within thirty days from the date of receipt of the names of the nominees. Upon receipt of the communication from the respondent, the appellant shall constitute the Arbitral Tribunal in terms of Clause 64(3)(b) of the General Conditions of Contract within thirty days from the date of the receipt of the communication from the respondent. The parties to bear their respective costs.”

(emphasis supplied)

9. The submission made by the respondent cannot be accepted. In the present case, the arbitration clause contains a reference to mediation so that the parties could explore settlement, failure of which would require the promoter to appoint the Arbitrator.

10. The petitioner in pursuance of the dispute resolution clause approached the Delhi High Court Mediation and Conciliation Centre and made the request to the respondent to participate in the conciliation proceedings and comply with clause 36 of the agreement in its full effect.

11. The respondent chose not to appear before the conciliation officer and as a result on 05.09.2023, the conciliatory officer was pleased to close the



conciliation between the parties as a “*non-starter*”.

12. In the present case, the respondent himself has failed to adhere to Clause 36 of the Dispute Resolution Clause.

13. Even otherwise, the submission of the counsel for the respondent that it is the promoter who shall appoint the arbitrator is in contravention to section 12(5) read with Schedule VII of the Arbitration and Conciliation Act, 1996 specifically since “*the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator.*”

14. The said appointment has been held impermissible in view of the judgment of the Hon’ble Supreme Court in ***TRF Ltd. v. Energo Engineering Projects Ltd.***, (2017) 8 SCC 377 whereby the following was held:-

“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 expressed by the High Court is not sustainable and we say so.”

15. The said appointment is also hit by the judgment of the Hon’ble Supreme Court in ***Perkins Eastman Architects DPC & Ors. vs. HSCC (India) Ltd.***” (2020) 20 SCC 760. The operative portion reads as under:-

“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 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..”

(emphasis supplied)

16. Further, the judgment of the Hon’ble Supreme Court in ***Central Organisation for Railway Electrification (supra)*** relied upon by the respondent is distinguishable as in that case out of a panel of 4 Arbitrators (which was to be given by the General Manager), the respondent had been given the power to select 2 names from the 4 names. Hence, the Hon’ble Supreme Court was of the view that the power of General Manager to nominate the Arbitrator was ‘**counter-balanced**’ by the power of the respondent to select any of the two nominees. The same is not true for the



present case. In the current circumstance, the power of appointment of arbitrator lies only with the promoter/employee/related person of the respondent and is thereby hit by section 12(5) read with Schedule VII of the Arbitration and Conciliation Act, 1996. In this circumstance, the unilateral appointment of this nature is impermissible in view of the judgments of the Hon'ble Supreme Court in ***Perkins Eastman Architects DPC & Ors. vs. HSCC (India) Ltd.***” (2020) 20 SCC 760 and ***TRF Ltd. v. Energo Engineering Projects Ltd.***, (2017) 8 SCC 377.

17. Further, the judgment of the Hon'ble Supreme Court in “***Union of India vs. Parmar Construction Company***” (2019) 15 SCC 682 is also not applicable as it was prior to the judgment of the Hon'ble Supreme Court in ***Perkins Eastman Architects DPC & Ors. vs. HSCC (India) Ltd.***” (2020) 20 SCC 760 and has failed to consider the judgment of the Hon'ble Supreme Court in ***TRF Ltd. v. Energo Engineering Projects Ltd.***, (2017) 8 SCC 377 .

18. In this view of the matter, the petition is allowed and disposed of with the following directions:

- i) Mr. Aashneet Singh (Adv.) (Mob. No. 9958864713) is appointed as a Sole Arbitrator to adjudicate the disputes between the parties.
- ii) 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 the Fourth Schedule of the Arbitration & Conciliation Act, 1996.
- iii) The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the



reference.

- iv) It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claim, 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.
- v) The parties shall approach the learned Arbitrator within two weeks from today.

JASMEET SINGH, J

JULY 15, 2024/DM

Click here to check corrigendum, if any

(Corrected and released on 23.07.2024)