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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **O.M.P. (COMM) 300/2022, I.A. 11331/2022, I.A. 11333/2022**
MS ERA INFRA ENGINEERING LIMITED

.....Petitioner

Through: Mr. Anirban Bhattacharya, Mr. Rushil
Anand, Mr. Rajiv, Advs.

versus

AIRPORT AUTHORITY OF INDIA

.....Respondent

Through: Mr. Archit Mishra, Adv.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

ORDER

08.08.2025

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1. This is a petition filed under section 34 of the Arbitration and Conciliation Act, 1996 ("**1996 Act**") seeking to challenge the Arbitral Award dated 25.02.2022 in the matter between "*Ms Era Infra Engineering Limited vs. Airport Authority of India*".
2. The petitioner participated in the bidding process initiated by the respondent for the project titled "*Construction of New Integrated Terminal Building at VSI Airport, Port Blair*" and emerged as the L1 bidder. Pursuant thereto, the respondent issued a Letter of Award dated 01.09.2014 in favour of the petitioner, and an Agreement was executed between the parties on 19.09.2014.
3. The arbitration clause is clause 25 of GCC in the Contract Agreement which reads as under:-

"CLAUSE 25

Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications,



design, drawings and instruction here-in before mentioned and as to the quality of workmanship or materials used on the work or.as to any other question, claim, right, matter or thing whatsoever, in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the work or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned herein after:

i) Through Dispute Resolution Committee: Any dispute as stated above shall be referred in the first place to the Dispute Resolution Committee (DRC) appointed by the Executive Director / Member (Planning) / Chairman, Airports Authority of India.

a. If a dispute of any kind, whatsoever, arises between the procuring entity and contractor in connection with or arising out of the contract or the execution of the works, whether during the execution of the works or after their completion and whether before or after the repudiation or termination of the contract, including any disagreement by either party with any action, opinion, instruction, determination, certificate or valuation of the Engineer, the matter in dispute shall in the first place, be referred to the Dispute Resolution



Committee (ORC) appointed by Chairman, AAI.

- b. DRC, thus constitute may act as 'concilator and will be guided by principles of 'conciliation' as included in part III of Arbitration & Conciliation Act 1996. DRC should take into consideration, rights and obligations of parties, usage to trade concerned and circumstances surrounding the dispute(s), including any previous business practices between parties. Efforts of DRC should be to come to an amicable settlement of outstanding disputes. If parties agree, a written settlement will be drawn up and signed by the parties. DRC will authenticate the settlement agreement and furnish a copy to each party.*
- c. DRC will give its report with in 45 days of its constitution.*

It is also a term of contract that fees and other expense if payable to DRC shall be paid equally by both the parties i.e. AAI and Contractor.

Unless the contract has already been repudiated or terminated, the contractor shall, in every case, continue to proceed with the work with all due diligence.

It is also a term of contract that if the contract does not make any demand for Dispute Resolution committee in respect of any claim in writing 90 (Ninety) days of receiving the intimation from the AAI that the bill is ready



for payment, the claim of contractors) will be deemed to have been waved and absolutely barred and the AAI shall be discharged and released of all liabilities under the contract in respect of these claims.

.....”

4. Subsequently, disputes arose between the parties. Dissatisfied with the decision of the Dispute Resolution Committee (DRC), which dismissed all of the petitioner's claims, the petitioner invoked the arbitration clause.
5. *Vide* order dated 03.05.2018, the respondent appointed a retired engineer of the respondent as the Sole Arbitrator. The petitioner filed OMP (T)(COMM.) 51/2018 before the Hon'ble High Court of Delhi under Section 14 of the Arbitration and Conciliation Act, 1996, seeking termination of the mandate of the learned Arbitrator. However, *vide* judgment dated 05.07.2018, the Hon'ble High Court refused to interfere with the appointment.
6. Thereafter, the impugned Award dated 25.02.2022 was passed rejecting the claims of the petitioner and allowing the counter claim of the respondent. The petitioner intimated the respondent, requesting it to file its claims in accordance with the provisions of the Insolvency and Bankruptcy Code, 2016 (**“IBC”**). The moratorium of the petitioner was lifted on 11.06.2024 when the NCLT approved the resolution plan of the petitioner and the CIRP process was completed.
7. During the course of hearing of this petition, on 15.04.2025, learned counsel for the petitioner was given one weeks' time to file a *Vakalatnama* along with the fresh amended memo of parties. The same



have been filed but are not on record.

8. A copy of the same has been handed over in Court today, which is taken on record.
9. Mr. Bhattacharya, learned counsel for the petitioner has restricted his arguments only on the ground that the Sole Arbitrator was appointed unilaterally and hence, the Award passed by the learned Arbitrator is hit by ***TRF Ltd. v. Energo Engineering Projects Ltd., (2017) 8 SCC 377*** and ***Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd., (2020) 20 SCC 760.***
10. He has drawn my attention to paragraph 4 of the Award dated 25.02.2022 which reads as under:-

“4. Member (Planning), Airports Authority of India appointed me as Sole Arbitrator to adjudicate on disputes and claims arising due to the disputes, vide letter No. LW/11011/19/2018/70 Dated 02/03.05.2018.”

11. *Per Contra*, Mr. Mishra, learned counsel for the respondent has drawn my attention to the Order dated 05.07.2018 passed in O.M.P. (T) (COMM.) 51/2018, a petition filed under section 14 and 15 of the 1996 Act by the petitioner on the same grounds. Paras 17 and 18 of the said order are extracted below:-

“17. Section 12(1) of the Act provides for disclosure by the proposed Arbitrator of circumstances that are likely to give rise to justifiable doubt as to his independence or impartiality. Fifth Schedule to the Act illustrates such grounds which give rise to justifiable doubt as to the independence or impartiality of the Arbitrator. Section 13 of the Act further states that a challenge



to the Arbitrator would have to be made in accordance with the procedure agreed between the parties failing which, a party, intending to challenge the Arbitrator shall, within 15 days after coming to know about the constitution of the Arbitral Tribunal or after becoming aware of any such circumstances which give rise to justifiable doubt as to the independence or impartiality of such Arbitrator, shall send a written statement of the reason for challenge to the Arbitral Tribunal. If the challenge is not successful, in terms of Section 13(4) of the Act, the Arbitral Tribunal shall continue the arbitral proceedings and make the Arbitral Award. Such an award, in terms of Section 13(5) of the Act, can be challenged in accordance with Section 34 of the Act. Therefore, as the challenge made by the petitioner would fall under Entry 31 of the Fifth Schedule to the Act, the petitioner may raise the same before the Arbitrator in accordance with procedure prescribed in Section 13 of the Act and the present petition would not be maintainable.

18. In view of the above, I find no merits in the present petition and the same is accordingly dismissed. The petitioner shall however, be at liberty to raise all its contentions on the alleged impartiality of the Arbitrator in accordance with Section 13 read with Section 12 of the Act. I may clarify that this Court has not gone into the allegations made in the petition in this regard.”

- 12.** Mr. Mishra states that in view of the said paragraphs, the argument of the petitioner will not lie. Further, the petitioner himself filed an



application under Section 29A(5) of the Arbitration and Conciliation Act, 1996, seeking extension of the mandate of the learned Sole Arbitrator and hence, the petitioner has given a waiver to the applicability of section 12(5) proviso of the 1996 Act.

13. I have heard the counsel for the parties.
14. I am unable to agree with the contentions advanced by the learned counsel for the respondent. The judgment dated 05.07.2018 was rendered by this Court prior to the pronouncement of the judgment of the Hon'ble Supreme Court in ***Perkins Eastman Architects DPC (supra)***. Furthermore, even in the Order dated 05.07.2018, this Court did not examine the contention relating to the impartiality of the learned Sole Arbitrator and expressly left the issue open.
15. In the order dated 05.07.2018, it was observed that under section 13 of the 1996 Act, a party intending to challenge the appointment of Arbitrator on the grounds giving rise to justifiable doubts as to independence or impartiality must do so in accordance with the agreed procedure, or, failing that, by sending a written statement to the Arbitral Tribunal within fifteen days of becoming aware of such circumstances. If the challenge fails, the Tribunal proceeds and the Award can thereafter be challenged in accordance with section 34 of the 1996 Act.
16. The law on unilateral appointment of an Arbitrator is well settled. The respondent cannot unilaterally appoint an Arbitrator as there will always be an apprehension of bias and non-neutrality in such arbitration proceedings. The relevant portion of ***Perkins Eastman Architects DPC (supra)*** has held as under:-

“20. We thus have two categories of cases. The first, similar to



the one dealt with in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] 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. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] , 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 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]*”

17. In view of the above judicial decision, it is evident that the unilateral appointment of an Arbitrator by one party having an interest in the outcome of the dispute is impermissible in law. In the present case, the Member (Planning), Airports Authority of India, appointed a retired engineer as the Sole Arbitrator. Such an appointment, having been made solely by the respondent (being a party to the dispute), falls squarely within the mischief contemplated in ***Perkins Eastman Architects DPC (supra)*** and ***TRF Ltd. (supra)***. The same has further been clarified by the Hon’ble Supreme Court, recently, in ***Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV), (2025) 4 SCC 641.***
18. The principle that emerges from these judgments is that any person or authority who has a vested or institutional interest in the dispute, or is connected with one of the parties, cannot have the exclusive right to appoint a Sole Arbitrator. This is because such exclusivity inherently carries an apprehension of bias and undermines the neutrality and



fairness being the foundation of the arbitral process. Therefore, the appointment made by the Member (Planning) is legally unsustainable and cannot be upheld.

19. The argument of the learned counsel for the respondent that the petitioner himself filed a petition seeking extension of mandate of the learned Sole Arbitrator, hence the petitioner has given a waiver is misplaced in the view of the judgment of ***Mahavir Prasad Gupta & Sons v. State (NCT of Delhi)***, 2025 SCC OnLine Del 4241 wherein it was categorically observed that mere participation in section 29A proceedings does not amount to waiver

“43. Consenting to the extension of the mandate of the arbitrator under Section 29A(3) of the Act does not constitute a valid express waiver in writing as required under the proviso to Section 12(5) of the Act. The view of the learned Single Judge of the Court in Man Industries (India) Ltd. (supra) is the correct as participation in the arbitral proceedings or seeking an extension of the mandate of the arbitrator does not constitute a valid waiver.....”

20. For the said reasons, the petition is allowed and the Arbitral Award dated 25.02.2022 is set aside. Further, both parties state that, without prejudice to their rights and contentions, a Sole Arbitrator be appointed by this. Hence, with consent of parties, without prejudice to their rights and contentions, the following directions are issued:-

- i) Hon'ble Mr. Justice Sanjiv Khanna, Former Chief Justice of India (Mob. No. 9818123334) is appointed as a Sole Arbitrator to adjudicate the disputes between the parties.



- ii) The arbitration will be held under the aegis and rules of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi (hereinafter, referred to as the 'DIAC').
 - iii) The remuneration of the learned Arbitrator shall be in terms of DIAC (Administrative Cost and Arbitrators' Fees) Rules, 2018.
 - iv) The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.
 - v) 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/counter-claims and merits of the dispute of either of the parties, are left open for adjudication by the learned arbitrator.
 - vi) The parties shall approach the learned Arbitrator within two weeks from today.
- 21.** The present petition is disposed of in the aforesaid terms.

AUGUST 8, 2025/PK

JASMEET SINGH, J