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

\+ ARB.P. 1352/2023

CHABBRAS ASSOCIATES ... Petitioner

Through: Ms.Krishna Parkhani, Adv.

versus

M/S HSCC (INDIA) LTD & ANR. ... Respondent

Through: Mr.Harshit Agarwal, Mr.Kamal Kumar and Mr.Baldev Singh, Advocates (VC) for R-1 & 2

CORAM:
HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

O R D E R

% 14.02.2024

1. The present Petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as *the A&C Act*) seeking the appointment of a sole Arbitrator to adjudicate upon the disputes arising because of premature termination of the work order dated 20.08.20 which was assigned to the petitioner by the respondent no1. The scope of work included construction work for the Director's Residence, Phase II, III, IV and V Residential Quarters for NIAB. The clause 25 of the GCC of the company provides for the arbitration clause. The relevant portion of Clause 25 of the GCC is quoted hereinafter for ready reference:

'25. ... It is also a term of this contract that no person, other than a person appointed by Client, as aforesaid, should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to

arbitration at all.'"

2. Learned counsel for the petitioner submitted that the petitioner had approached this Court by way of Arb. P. 782/2022 seeking appointment of the arbitrator. The petitioner was directed to exhaust all the remedies available to them as per the dispute resolution mechanism mentioned in the work agreement/GCC.
3. Learned counsel submits that thereafter the petitioner approached Respondent No.2 i.e., the appealing authority seeking the resolution of the disputes. The Appealing Authority responded to the Representation dated 17th May 2023, by way of a decision dated 14th June 2023, whereby the claims of the Petitioner were rejected. The petitioner further also exhausted all the remedies provided in the agreement for dispute resolution. By letter dated 31-10-2023(sent through e-mail and speed post), the Petitioner sought the appointment of a fair, neutral, and unbiased arbitrator as per clause 25 of GCC.
4. Respondent no.2 unilaterally appointed Shri Anant Kumar, Engineer in Chief (Retd.) CPWD as the Sole Arbitrator without the concurrence of the Petitioner.
5. Ld. Counsel for the Petitioner has also submitted that the appointment of an Arbitrator as per Clause 25 of the GCC is contrary to the settled principles of neutrality, independence, and impartiality.
6. Learned counsel for the petitioner has submitted that if a sole arbitrator is to adjudicate upon the disputes between the parties then any interested party cannot have the exclusive right to appoint such sole arbitrator. Reliance was placed upon ***Perkins Eastman Architects DPC & Anr. vs.***

HSCC (India) Limited. Arb. Appl. No. 32/2019; ***Voestapline Schienen Gmbh vs. Delhi Metro Rail Corporation Limited,*** 1 (2017) 4 SCC 665.

7. *Per-contra*, Ld. Counsel for the Respondents contends that the Arbitrator has been appointed as per the Arbitration agreement between the parties and since the mandate is not challenged by the Petitioner the present petition is liable to be dismissed.
8. Ld. Counsel for Respondents has submitted that the Petitioner vide notice for appointment of Arbitrator dated 31.10.2023, given in terms of the Arbitration clause agreed between the parties, inter-alia requested the Respondent no.2 to appoint a neutral and independent Arbitrator. Consequently, Respondent No. 2 appointed a neutral and independent sole Arbitrator in accordance with the terms of the arbitration agreement between the parties. Ld. Counsel further submitted that the sole Arbitrator is presently seized of the matter. Thus, the present petition is not maintainable as the arbitral tribunal has already been constituted.
9. The Supreme Court ruled in ***Perkins Eastman Architect DPC and Anr. vs. HSCC (India) Ltd.:*** (2020) 20 SCC 760 that a party with an interest in the dispute cannot unilaterally name or appoint an arbitrator. There must be an independent arbitrator for the adjudication of disputes.
10. It is no longer *res-integra* that if a party has entered into an arbitration agreement which contains a clause that gives only one of the parties the exclusive right to appoint an arbitrator is bad in the eyes of the law and contrary to the legislative intent. It is a settled principle of law that this court has the power to appoint an arbitrator in case where the appointment has been made unilaterally by a party interested in the proceedings The Hon'ble Supreme Court in ***Perkins*** (Supra) inter-alia

held that the unilateral appointment of an Arbitrator is invalid. The relevant extract of the following judgment is being reproduced hereunder:

> ***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.*
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> ***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]

*11.*The co-ordinate bench of this court in ***Proddatur cable TV Digi Services v. Siti Cable Network Limited,*** 2020 SCC OnLine Del 350 *inter-alia held as under:*

23. Thus, following the ratio of the judgment in the case of Perkins (supra), it is clear that a unilateral appointment by an authority which is interested in the outcome or decision of the dispute is impermissible in law. The Arbitration Clause in the present case empowers the company to appoint a Sole Arbitrator. It can hardly be disputed that the 'Company' acting through its Board of Directors will have an interest in the outcome of the dispute. In the opinion of this Court, the clause

is directly hit by the law laid down in the case of Perkins (supra) and the petition deserves to be allowed.

24. The respondent is right in its contention that the autonomy of the parties to the choice of procedure is the foundational pillar of arbitration and that the petitioner had entered into the Distribution Agreement with the Arbitration Clause, out of its free will. The facts in the case of Perkins (supra) were similar where the parties had entered into an agreement in which there was a clause for Dispute Resolution and which empowered the CMD to appoint the Sole Arbitrator. Despite the parties having agreed upon such an Arbitration Clause, the Supreme Court held that the CMD suffered from the disability of appointing the Arbitrator as he was interested in the outcome of the dispute. The underlying principle in arbitration no doubt is party autonomy but at the same time fairness, transparency and impartiality are virtues which are equally important. If the Authority appointing an Arbitrator is the Head or an employee of a party to the agreement then its interest in its outcome is only natural. It goes without saying that once such an Authority or a person appoints an Arbitrator, the same ineligibility would translate to the Arbitrator so appointed. The procedure laid down in the Arbitration Clause cannot be permitted to override considerations of impartiality and fairness in arbitration proceedings.

26. Thus, the Company is run none other than the Directors collectively. Duties of the Directors have been stipulated in Section 166 of the Companies Act, 2013. A bare perusal of the duties clearly reveals that the Director at all times, has to act in good faith to promote the objects of the Company and in the best interest of the Company, its employees and the shareholders. A Director shall not involve in a situation in which he may have a direct or an indirect interest that conflicts or possibly may conflict with the interest of the Company. It goes without saying that the Directors of the Company as a part of the Board of the Directors would be interested in the outcome of the Arbitration proceedings. The Company therefore, acting through its Board of Directors would suffer

the ineligibility under Section 12(5) read with Schedule VII of the Act. The same ineligibility would also apply to any person appointed by the said Company. Thus, in my view, for the purposes of Section 11(6) and Section 12(5) read with Schedule VII, there cannot be a distinction based on the appointing authority being a Company.

12. In my view the arbitration clause empowering unilateral appointment of a sole arbitrator stands vitiated in light of the law laid down by the apex court in ***Perkins (****Supra)*. The contention of learned counsel for the respondent that since arbitrator has been appointed in terms of the contract, the only option available to the petitioner is to challenge the mandate of the arbitrator, is noted to be rejected. The unilateral appointment of an arbitrator in terms of Clause 25 of GCC is patently bad in law. The continuance of such would only amount to allowing the perpetuation of illegality. The Court cannot simply allow such illegality, merely because the petition has been filed under Section 11 of the Act and not under Section 14 and 15 of the Act, as raised by the respondent. Any unlawful act has to be put to an end immediately. There is no doubt in the mind of the Court that Clause 25 of the GCC is in teeth of law.

13. Taking into consideration the apex court's rulings as well as the stance adopted by this court's coordinate benches, it can be said that both parties acknowledge the existence of an arbitrable dispute and that the unilateral appointment of the Arbitrator by the Respondent is *non-est* and unsustainable. Therefore this court is of the opinion that the mandate of the arbitrator shall cease to operate. The present petition is **disposed of** with the following directions:

    i) The disputes between the parties under the said agreement are

referred to the arbitral tribunal.

ii) Mr. Justice Vipin Sanghi, Former Chief Justice, Uttarakhand High Court, Mobile No.9871300037 is appointed as a sole Arbitrator to adjudicate the disputes between the parties. The remuneration of the learned arbitrator shall be in terms of the fees schedule of the A&C Act.

iii) The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act before 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 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.

v) The parties shall approach the learned arbitrator within two weeks from today.

DINESH KUMAR SHARMA, J

FEBRUARY 16, 2024
Pallavi