

GAHC010267032022



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Arb.P./5/2023

BHARTIA DOOARS (JV) AND 2 ORS
REPRESENTED BY RATAN SARKAR, ATTORNEY HOLDER OF THE
COMPANY, 100B BARUAH ROAD, GUWAHATI

2: M/S DOOARS CONSTRUCTION COMPANY
REPRESENTED BY RATAN SARKAR
ONE OF THE PARTNERS

3: BHARTIA INFRA PROJECTS LTD
REPRESENTED BY RAMAVTAR BHARTIA AGED ABOUT
A COMPANY INCORPORATED UNDER THE COMPANIES ACT
1956 HAVING ITS REGISTERED OFFICE AT 201
ROYAL ARCADE
2ND FLOOR
DR. B. BARUAH ROAD
ULUBARI
GUWAHATI-78100

VERSUS

UNION OF INDIA AND 3 ORS
REPRESENTED BY GENERAL MANAGER, N.F. RAILWAY, MALIGAON,
GUWAHATI-781011

2:GENERAL MANAGER (VERS)
N.F. RAILWAY
MALIGAON
GUWAHATI-781011

3:ADDITIONAL DIVISIONAL RAILWAY MANAGER
ALIPURDUAR JUNCTION
ALIPURDUAR
WEST BENGAL
PIN-736123

4:THE DIVISIONAL ENGINEER
N.F. RAILWAY
ALIPURDUAR JUNCTION
ALIPURDUAR
WEST BENGAL-73612

Advocate for the Petitioner : MR. R HUSSAIN

Advocate for the Respondent : DY.S.G.I.

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA

ORDER

05.02.2024

1. Heard Mr. R. Hussain, learned counsel for the petitioners and Mr. S.K. Medhi, learned CGC appearing for the respondents.

2. This is an application under Section 11[6] of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the '1996 Act'), by which the petitioner has invoked the Arbitration Clause in the Contract Agreement executed between the parties, for settling the dispute relating to the contract work, i.e., 'Manufacturing and Supplying of 50 mm Size Machine Crushed Ballast at Jorai Depot under Alipurduar Division" pursuant to NIT No.14/I of 2014 dated

19.11.2014.

3. The petitioner's counsel submits that the petitioner had completed the contract work, which was allotted to him in pursuance to the Tender Notice dated 19.11.2014. However, as the petitioner was not paid the security deposit and price escalation for the material supplied, he invoked the Arbitration Clause. He accordingly submits that this Court should appoint an Arbitrator, as the Arbitrators that have been proposed by the respondents are their own railway officials.

4. Mr. S.K. Medhi, learned CGC submits that the earnest money and security deposit payable to the petitioner has already been released to the petitioner, as has been reflected in Para 8 of the affidavit-in-opposition filed on behalf of the respondents on 20.12.2023. He submits that in view of Para 19 of the affidavit-in-opposition filed by the respondents, the dispute between the parties would have to be settled through arbitration in terms of the 1996 Act.

5. I have heard the learned counsel for the parties.

6. Though the Arbitration Clause has been invoked by the petitioners, there is a stalemate with regard to the choice of an Arbitrator. As such, this Court is of the view that an Arbitrator would have to be appointed in terms of Clause 11[6] of the 1996 Act.

7. In respect of the proposal put forth by the respondents for appointment of an Arbitrator, who are employees of the Indian Railways, this Court is of the

view that persons proposed to be appointed as Arbitrators cannot be interested persons, in terms of Section 12(1) of the 1996 Act read with the law laid down by the Hon'ble Supreme Court in the case of ***Perkins Eastman Architects DPC & Anr. Vs. HSCC (India) Ltd.***, reported in ***(2020) 20 SCC 760***, inasmuch as, the contract is between the Railways and the petitioners.

8. In the case of ***Perkins Eastman (supra)***, the Hon'ble Supreme Court has referred to another decision of the Supreme Court, i.e., ***TRF Ltd. Vs. Energo Engg. Projects Ltd.***, reported in ***(2017) 8 SCC 377*** and held that by virtue of the Amending Act (3 of 2016), the Managing Director was not eligible to become an Arbitrator, nor could he nominate a person as an Arbitrator, that is, by virtue of Section 12(5) of the 1996 Act and the Seventh Schedule. This is due to the fact that he would be having an interest in the dispute.

9. The extract of paragraph no.18, paragraph no.19, 20 and the extract of paragraph 21 in the case of ***Perkins Eastman (supra)*** is reproduced hereinbelow-

18. The issue was discussed and decided by this Court as under (TRF Ltd. Vs. Energo Enggg. Projects Ltd., SCC pp.403-04, paras 50-54)

“50. First, we shall deal with clause (d). There is no quarrel that by virtue of Section 12(5) of the Act, if any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator. There is no doubt and cannot be, for the language employed in teh Seventh Schedule, the Managing Director of the Corporation has become ineligible by operation of law.....”

“19. It was thus held that as the Managing Director became ineligible by operation of law to act as an arbitrator, he could not nominate another person to act as an arbitrator and that once the identity of the Managing

Director as the sole arbitrator was lost, the power to nominate someone else as an arbitrator was also obliterated. The relevant Clause in said case had nominated the Managing Director himself to be the sole arbitrator and also empowered said Managing Director to nominate another person to act as an arbitrator. The Managing Director thus had two capacities under said Clause, the first as an arbitrator and the second as an appointing authority. In the present case we are concerned with only one capacity of the Chairman and Managing Director and that is as an appointing authority.

20. *We thus have two categories of cases. The first, similar to the one dealt with in TRF Limited, [\(2017\) 8 SCC 377](#) 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 Limited, 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 (Act 3 of 2016) and recognised by the decision of this Court in TRF Limited.”

10. The amended Section 12(1) of the 1996 Act provides the disclosures that a would be/proposed arbitrator is to make, regarding any doubts that may arise in his selection as an independent/impartial Arbitrator. Section 12(1) is reproduced hereinbelow as follows-

“12. Grounds for challenge.- [(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,-

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1.- The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.- The disclosure shall be made by such person in the form specified in the Sixth Schedule.”

11. Thus, as per Section 12 of the 1996 Act and the law laid down by the Supreme Court in **Perkins Eastman (supra)** any person who falls under any

of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an Arbitrator. Further, a person who is statutorily ineligible to be an Arbitrator cannot nominate a person as an Arbitrator. Keeping in view the judgment of the Hon'ble Supreme Court in the case of ***Perkins Eastman (supra)*** and the fact that the application for appointment of a sole Arbitrator has been made subsequent to the amendment of Section 12 of the 1996 Act, this Court is of the view that a railway official cannot be appointed/nominated as an Arbitrator, as he is an interested person.

12. In the present case, the application for appointment of an Arbitrator has been made subsequent to the 2015 amendment and as such, the decision of the Hon'ble Supreme Court in the case of ***Perkins Eastman (supra)***, would be applicable to the facts of this case. Accordingly, the appointment of an Arbitrator in terms of Section 11 and the amended Section 12 of the 1996 Act would require an independent Arbitrator to be appointed.

13. The Notification No. 99 dated 04.08.2023 issued by the Registry of this Court shows that Smt. Chaya Rani Goswami, Retd. District & Sessions Judge is among the panel of Arbitrators amongst others, who can be appointed as an Arbitrator. As the parties do not have any objection to the Smt. Chaya Rani Goswami, Retd. District & Sessions Judge being appointed as the Arbitrator to decide the dispute between them, Smt. Chaya Rani Goswami, Retd. District & Sessions Judge is appointed as the Arbitrator in this case.

14. Consequently, the parties shall take steps, in terms of Section 12 of the 1996 Act, to ascertain whether there is any circumstance or fact regarding the inability of Smt. Chaya Rani Goswami, Retd. District & Sessions Judge to act as an Arbitrator in terms of the amended Section 12 of the 1996 Act.

15. The writ petition is accordingly disposed off.

JUDGE

Comparing Assistant