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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision:- 10.10.2023

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ARB.P. 637/2023

TALEDA SQUARE PRIVATE LIMITED

..... Petitioner

Through: Ms.Nina R Nariman with Ms.Geetika
Kapur, Advs.

versus

RAIL LAND DEVELOPMENT AUTHORITY Respondent

Through: Mr. R.V.Sinha with Mr. A.S.Singh,
Mr.Amit Sinha, Advs. and Mr. Rajeev Sharma,
Adv.

CORAM:

HON'BLE MS. JUSTICE REKHA PALLI

REKHA PALLI, J(ORAL)

1. The present petition under Section 11 of the Arbitration and Conciliation Act seeks appointment of an arbitrator/arbitral tribunal for adjudication of disputes, which have arisen between the parties in the context of lease agreement dated 31.03.2015.

2. Learned counsel for the petitioner submits that in terms of the arbitration clause contained in the aforesaid lease agreement, the disputes between the parties are required to be adjudicated by a three member tribunal, with one member of the tribunal being the petitioner's nominee and the other being the respondent's nominee, with a further stipulation that the vice chairman of the respondent will appoint the presiding arbitrator. She submits that upon the petitioner invoking arbitration and suggesting the name of its nominee arbitrator, the respondent refused to accept the said



names and instead, offered names of five persons, who were on the panel of the respondent and directed the petitioner to select one of those persons as its nominee arbitrator. This offer of the respondent, she submits, is not acceptable to the petitioner as the panel which has been offered to the petitioner is not at all broad-based and is, therefore, not in consonance with the decision of the Apex Court in *Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Limited*, (2017) 4 SCC 665. She also seeks to place reliance on the decisions of the Apex Court in *TRF Limited v. Energo Engineering Projects Limited*, (2017) 8 SCC 377 and *Perkins Eastman Architects DPC & Anr. v. HSCC(India) Limited*, (2020) 20 SCC 760 as also on a recent decision of a Coordinate Bench in *Margo Networks Pvt. Ltd. & Anr. v. Railtel Corporation of India Ltd.*, 2023 SCC Online Del 3906. She, therefore, prays that either the petitioner be granted liberty to appoint its own nominee and the respondent be granted the same liberty to appoint its nominee arbitrator or both the nominee arbitrators be appointed by this Court.

3. On the other hand, learned counsel for the respondent by relying on decisions of the Apex Court in *Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML(JV) A Joint Venture Company*, (2020) 14 SCC 712 and *Union of India v. Pradeep Vinod Construction Company*, (2020) 2 SCC 464 as also on a decision of a Coordinate Bench in *BCC Developers and Promoters Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd.* 2021 SCC Online Del 4837, submits that once the agreement envisages that the nominee arbitrator of the petitioner is to be appointed from the panel to be offered by the respondent, the petitioner is bound by this condition to select its nominee arbitrator from the panel



maintained by the respondent. Furthermore, by placing reliance on a recent decision of the Apex Court in *Union Territory of Ladakh v. Jammu & Kashmir National Conference, 2023 SCC OnLine SC 1140*, he submits that once the condition of appointment of the claimants nominee arbitrator from the panel of arbitrators maintained by the respondent was upheld in *Central Organisation for Railway Electrification* (supra), this Court ought to follow the said course of action.

4. Before dealing with the rival submissions of the parties, it would be apposite to note the relevant arbitration clause as contained in the lease agreement dated 31.03.2015. The same reads as under:

"23.5 PROCEDURE FOR ARBITRATION

*23.5.1 In the event of any dispute between the parties hereto in the construction or operation of this Agreement, or the respective rights and liabilities of the parties on any matter in question, dispute on any account or as to the withholding by RLDA of any certificate to which the Lessee may claim to be entitled to, or if the RLDA fails to take a decision within the time specified in this regard and in any such case, but except in any of the Excepted Matters referred to in Article 23.4 of these conditions, the Lessee, after the time specified in this regard of its presenting its final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration. * * * **

23.5.10 In cases not covered by article 23.5.9 above, the Arbitral Tribunal shall consist of three retired officers of a Railway public sector undertaking (not below GM level) and/or retired Gazetted officers of the Railway (not below S.A. grade). For this purpose, a list of more than 3 names drawn from the panel of Arbitrators maintained by RLDA or otherwise will be sent to the Lessee 'within 60 days from the date when the written and valid demand for arbitration is received by the Vice Chairman of the RLDA. The Lessee will be asked to suggest at



least 2 names out of the list for appointment as Lessee's nominee within 30 days from the date of dispatch of the letter to the Lessee. The Vice Chairman of RLDA shall appoint at least one out of them as the Lessee's nominee and will, also simultaneously appoint the balance number of arbitrators from the panel of Arbitrators maintained by RLDA or otherwise, duly indicating the presiding arbitrator from among the 3 arbitrators so appointed. Vice Chairman shall complete this exercise of appointing the arbitral tribunal within 30 days from the receipt of the names of the Lessee's nominee.

5. From a perusal of the aforesaid, what emerges is that the methodology as prescribed under clause 23.5.10 of the agreement while entitling the claimant/petitioner to select one of the arbitrators from the panel of five offered by the respondent also empowers the respondents to nominate the other two arbitrators. Having given my thoughtful consideration to the rival submission of the parties, I find that the respondent's plea that the petitioner should be compelled to select its nominee arbitrator from the five member panel provided by the respondent cannot be accepted. Not only has such an approach been disapproved by the Apex Court in *Voestalpine Schienen Gmbh(supra)* but has also been categorically dealt with by a Coordinate Bench in *Margo Networks Pvt. Ltd. (supra)*, wherein the Court while dealing with a similar clause pertaining to the railway board had, after examining various decisions of the Apex Court including the decisions in *Voestalpine Schienen Gmbh(supra)* and *Central Organisation for Railway Electrification(supra)*, come to a conclusion that the panel of arbitrators being offered by the respondent therein, which was a ten member panel in the said case, was clearly restrictive and, therefore, proceeded to appoint the nominee arbitrators for both the petitioner and the respondent.



6. At this stage, it would be apposite to refer to the relevant extracts of the decision in *Margo Networks Pvt. Ltd. & Anr.(supra)*:-

“25. Thus, it was held by the Supreme Court in Voestalpine (supra) that:

- i. Affording a panel of five names to the petitioner from which the petitioner was required to nominate its nominee arbitrator, was restrictive in nature; the same created room for suspicion that DMRC may have picked up its own favourite;*
- ii. Choice should be given to the concerned party to nominate any person from the entire panel of arbitrators;*
- iii. The two arbitrators nominated by the parties should be given full freedom to choose the third arbitrator;*
- iv. The panel ought not to be restricted/limited to retired engineers and/or retired employees but should be broad based and apart from serving or retired employees of government departments and public sector undertakings, the panel should include lawyers, judges, engineers of prominence from the private sector etc.*

26. CORE does not in any manner overrule Voestalpine (supra) or narrow down the scope thereof, although it does not deal specifically with the issue as to whether the panel afforded by the Railways in that case was in conformance with the principles laid down in Voestalpine (supra).

28. In the present case, the respondent has shared a panel of ten arbitrators with the petitioner, all being ex-employees of the Railways/RailTel. Apart from the ex-employees of the railways, no other person has been included in the panel. Such a panel is clearly restrictive and is manifestly not “broadbased” and therefore, impinges upon the validity of the appointment procedure prescribed in clause 3.37 of the RFP.

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 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 broadbased. 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”

7. In the light of the aforesaid, once the Coordinate Bench has dealt with an identical clause, I do not see any reasons as to why I should not adopt the same course of action. Even otherwise, I fail to appreciate as to how this position, where not only does the respondent have the power to unilaterally appoint two out of the three arbitrators and compels the petitioner to choose one of the panel of five arbitrators can be said to be meeting the test of “counter balancing” as laid down in *Voestalpine Schienen GmbH(supra)* and *Perkins(supra)*. The very fact that the petitioner was given an option to choose from a list of five persons in itself shows that the panel being offered by the respondent was not even sufficiently broad-based.

8. I have also considered the decision in *Union Territory of Ladakh (supra)* and find that in the said case, the Apex Court emphasised that the



High Court cannot refuse to follow any decision of the Apex Court only on the ground that it has referred to a larger Bench or a review petition thereto is pending. In the present case, as held by the Coordinate Bench, the question as to whether “counter balancing” can be achieved in a situation where one of the contracting parties has a right to appoint 2/3rd of the members of the arbitral tribunal was not specifically considered in *Central Organisation for Railway Electrification*(*supra*) and therefore, the said decision would not be applicable to the facts of the present case.

9. The petition, therefore, deserves to be allowed and consequentially, the petitioner’s prayer for appointing an independent impartial tribunal to adjudicate the disputes between the parties is accepted. The agreement between the parties contemplates a three member Arbitral Tribunal, accordingly, Justice G.P. Mittal, former Judge of this Court [Mobile no. 9910384619] is appointed as a nominee of the petitioner and Justice Vinod Goel, former Judge of this Court [Mobile No. 9910384637], is appointed as the nominee arbitrator for the respondent for adjudication of disputes between the parties arising out of lease agreement dated 31.03.2015. These two arbitrators shall now concur to appoint the presiding arbitrator within 30 days of the service of this order.

10. The fees of the learned Arbitral Tribunal will be governed by Schedule IV of the Act. Before entering upon reference, the learned Arbitrators will comply with Section 12 of the Act.

11. It is made clear that since this Court has not expressed any opinion on the merits of the rival claims of the parties, it will be open for the parties to file their respective claims/counter claims before the learned Arbitral Tribunal which will be considered in accordance with law.



2023 : DHC : 7384



12. A copy of this order be forwarded to the learned Arbitral Tribunal for information.

(REKHA PALLI)
JUDGE

OCTOBER 10, 2023
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