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Neutral Citation No. - 2023:AHC:157255

**Court No. 46**

**Case :-** ARBITRATION AND CONCILI. APPL.U/S11(4) No. - 142 of 2019

**Applicant :-** M/S Bansal Construction Office

**Opposite Party :-** Yamuna Expressway Industrial Development Authority And 2 Others

**Counsel for Applicant :-** J.P. Pandey

**Counsel for Opposite Party :-** Aditya Bhushan Singhal

**Hon'ble Ashwani Kumar Mishra,J.**

1. This petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act of 1996') for appointment of arbitrator, consequent upon accrual of dispute between the parties to the arbitration agreement. Clause 33 of the agreement, which contains the arbitration clause is reproduced hereinafter:-

**"Clause 33: ARBITRATOR**

Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and to the quality of workmanship or materials used on the work or as to any other question claim right or rates for extra items sanctioned and decided are not by the competent authority under the conditions of this contract, designs, drawings, specifications, estimates instructions or order on these conditions or otherwise concerning the work or the executive or failure to execute the same whether arising during the progress of the work or after the person or person appointed by the Chief Executive Officer, YEIDA. It will be no objection to any such appointment that the matter to which contract relates and that in the course of his duties as YEIDA servant, he had expressed views on all or any of the matters in dispute or differences. The arbitrator to whom the matter is originally or subsequently referred being incapacitated to act. The Chief Executive Officer of the YEIDA shall appoint another person to act as arbitrator in accordance with the term of contract. *It is also a term of his contract that no person other than a person appointed by the Chief-Executed Officer of the YEIDA as aforesaid/shall act as arbitrator and if for any reason, that is not possible, the matter is not to be referred to the arbitration at all.* The arbitrator(s) may from time to time with consent of the parties enlarge the time for making and publishing the award.

Subject as aforesaid the provisions of the Arbitration Act 1940 or any statutory modification or re-enactment thereafter and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause."

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2. Records reveal that the applicant was awarded contract for construction of 12 meter and 24 meter roads in Sector-18 near village Usmanpur. The contracted work was completed on 30.6.2017. Payments were released by the authority against running bills from time to time. Fourth and final bill was paid in March, 2019 wherein various deductions were made. Dispute thus arose between the parties. The applicant requested for reference of dispute to the arbitrator vide his letter dated 26.6.2019. Reminders were also sent whereafter this application has been filed.

3. Request for reference of dispute to arbitration has since been declined on the ground that Chief Executive Officer of the Authority alone is competent to arbitrate in the matter as per Clause 33 and as he has now become ineligible by virtue of Section 12(5) of the Act of 1996, therefore, the arbitration clause itself would cease to exist.

4. A counter affidavit has been filed by the opposite party stating that the applicant has submitted an affidavit before the authority stating that additional works were conducted by it on the spot on account of various hindrances and demand of additional compensation and for such variation no claim would be raised before the authority. This notarial affidavit is on a Rs. 100/- stamp paper. This affidavit is on a printed proforma and details are filled by hand which contains no date. The affidavit is referred to in para 16 of the counter affidavit. A rejoinder affidavit has been filed denying the averments made in para 16 of the counter affidavit stating that the affidavit does not bear the signature of the proprietor of the firm or its authorised agent/signatory.

5. The respondents also contend that the arbitration clause

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specifically contemplates that arbitrator could either be the Chief Executive Officer or by the person appointed by him and if for any reason, it is not so possible, the dispute is not to be referred to the arbitration, at all.

6. When the matter was heard yesterday, an objection was raised to the maintainability of the petition by Sri A.B. Singhal, relying upon a judgment of this Court in Arbitration Application No. 54 of 2017. This Court while examining a similar provision contained in the arbitration agreement to held as under:-

"The Arbitration Clause quoted in the earlier part of the judgment contains a recital to the effect "it is also a term of this contract that no person other than a person appointed as aforesaid should act as Arbitrator. ..." This recital in the Arbitration Clause clearly evinces the agreed intent of the parties that no person other than the Chief Engineer or any person nominated by him should act as Arbitrator. Now, this by itself would be hit by section 12(5) of the Act 1996 as amended in 2015 and would not come to the rescue of the opposite parties, however, these words are followed by the stipulation - **"and if for any reason this is not possible, the matter is not to be referred to Arbitration at all."** These words clearly evince the agreed intent of the parties not to refer the dispute to Arbitration if such Arbitration cannot be held by the Chief Engineer or any person nominated by him. The agreed intent not to refer the matter to arbitration in such an eventuality is evident from the arbitration clause. This stipulation in the Agreement is binding upon the parties including the applicant. Under sub-Section 6-A of section 11 of the Act 1996 all that this Court is required to see is the existence of an Arbitration Clause. I am of the considered opinion that in view of the aforesaid recital this application for appointment of an Arbitrator other than the Chief Engineer or any person nominated by him is not maintainable in view of the Agreement arrived at between the parties that in such an eventuality when the aforesaid Authorities cannot be appointed as Arbitrator, the matter would not be referred to Arbitration at all. In view of this stipulation neither the Amending Act 2015 nor the un-amended Act 1996 come to the rescue of the applicant. The application for appointment of the Arbitrator is accordingly rejected."

7. This Court has observed that where it is not possible to act in terms of arbitration agreement since the named arbitrator is ineligible to act by virtue of Section 12(5) of the

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Act, the arbitration itself would not be available for resolution of dispute as the terms of the agreement has to be given effect to. Sri A.B. Singhal for the respondent, therefore, submits that by virtue of statutory interdict introduced vide Section 12(5) of the Act, the arbitrator cannot function and in view of the specific clause in contract the consent of parties for arbitration would cease to exist.

8. Counsel for the applicant has placed reliance upon the Judgments delivered by the Supreme Court and High Courts to contend that arbitrator is liable to be appointed by this Court in the facts of the present case. Reference is made to the judgments of Supreme Court in Ellora Paper Mills Limited Vs. The State of Madhya Pradesh, Civil Appeal No. 7697 of 2021, dated 4.1.2022; Durga Charan Rautray Vs. State of Orissa and another, 2012 (1) AWC 404; United India Insurance Company Limited Vs. Antique Art Exports Private Limited, (2019) 5 SCC 362; Indian Oil Corporation Limited Vs. NCC Limited, (2023) 2 SCC 539; and the judgment of this Court in M.J.S. Construction and others Vs. Union of India and others, 2023 (1)ADJ 497; and the judgment of Delhi High Court in Ram Kripal Singh Construction Pvt. Ltd. Vs. NTPC, ARB.P 582/2020, dated 9.11.2022 (Delhi), in order to submit that the arbitration agreement is broadly in two parts, firstly, agreement for reference of dispute to arbitrator and secondly the procedure to be followed in the matter on such reference. It is urged that the procedure part contemplating party autonomy is always subservient to the statutory interdict contained in Section 12(5) of the Act of 1996 and cannot be construed as obliterating the first part of the agreement for reference of dispute to arbitrator.

9. It is submitted that the authority of the Chief Executive

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Officer to act as arbitrator or to appoint an arbitrator forms part of the procedure for appointment and even if such authority ceases to exist by virtue of Section 12(5) of the Act, the core clause contemplating adjudication of dispute by arbitrator would continue to subsist.

10. I have heard learned counsel for the parties and have perused the materials on record. It is no doubt true that the arbitration clause in this case is couched in such a manner that the arbitration itself would not be possible in terms of Clause 33 as the Chief Executive Officer of the Authority, being an officer would clearly be denuded of jurisdiction to act as arbitrator or to appoint an arbitrator by virtue of 7th Schedule read with Section 12(5) of the Act. The clause, however, has to be interpreted so as to cull-out the real intent of the parties. The agreement between the parties to refer all disputes arising out of contract to arbitrator is the core part of the agreement. The manner to appoint the arbitrator would, at best, fall in the realm of procedure. Merely because the person, who could act as an arbitrator in terms of arbitration clause becomes ineligible to act as arbitrator by virtue of Section 12(5) of the Act read with 7th Schedule, it would not mean that the core part of the agreement for referring the dispute for adjudication to arbitrator would be rendered nugatory. The interpretation, which is sought to be culled out by the respondents, would clearly defeat the object of neutrality of arbitrator or reference of dispute to arbitration. Section 12(5) of the Act read with 7th Schedule has been introduced so as to lend greater legitimacy to the process of arbitration by providing for an independent person to act as arbitrator and exclude the other party from becoming a judge in their own cause. This Court, therefore, would be inclined to lean in favour of an interpretation which effectuates the

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remedy of arbitration consistent with the legislative intent i.e. Section 12(5) of the Act of 1996 read with the 7th Schedule.

11. This Court is also cognizant of the observations made by the Supreme Court in Para 96 of the judgment in *Chloro Controls India (P) Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641, which is reproduced hereinafter:

“Examined from the point of view of the legislative object and the intent of the framers of the statute i.e. the necessity to encourage arbitration, the court is required to exercise its jurisdiction in a pending action, to hold the parties to the arbitration clause and not to permit them to avoid their bargain of arbitration by bringing civil action involving multifarious causes of action, parties and prayers.”

12. The object of introducing sub-section (5) of Section 12 read with Seventh Schedule came to be examined by the Supreme Court in *Ellora Paper Mills Ltd. v. State of M.P.*, (2022) 3 SCC 1. Relying upon earlier judgments of the Court it was observed as under in para 8 of the report:-

“8. An identical question came to be considered by this Court in *Jaipur Zila Dugdh Utpadak Sahkari Sangh [Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. v. Ajay Sales & Suppliers]*, (2021) 17 SCC 248 : 2021 SCC OnLine SC 730 , and after considering the decisions of this Court in *TRF [TRF Ltd. v. Energo Engg. Projects Ltd.]*, (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] and other decisions on the point, it is observed and held as under : (*Ajay Sales & Suppliers case [Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. v. Ajay Sales & Suppliers]*, (2021) 17 SCC 248 : 2021 SCC OnLine SC 730) , SCC paras 8.3 to 12)

"8.3. So far as the submission on behalf of the petitioners that the agreement was prior to the insertion of sub-section (5) of Section 12 read with Seventh Schedule to the Act and therefore the disqualification under sub-section (5) of Section 12 read with Seventh Schedule to the Act shall not be applicable and that once an arbitrator — Chairman started the arbitration proceedings thereafter the High Court is not justified in appointing an arbitrator are concerned the aforesaid has no substance and can to be accepted in view of the decision of this Court in *TRF Ltd. v. Energo Engg. Projects Ltd.* [*TRF Ltd. v. Energo Engg. Projects Ltd.*, (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] ; *Bharat Broadband Network Ltd. v. United Telecoms Ltd.* [*Bharat Broadband Network Ltd. v. United Telecoms Ltd.*, (2019) 5 SCC 755 : (2019) 3 SCC (Civ) 1] ; *Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd.* [*Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd.*, (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] In the aforesaid decisions, this Court had an occasion to consider in detail the

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object and purpose of insertion of sub-section (5) of Section 12 read with Seventh Schedule to the Act.

9. In *Voestalpine Schienen GmbH* [*Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd.*, (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] it is observed and held by this Court that the main purpose for amending the provision was to provide for "neutrality of arbitrators". It is further observed that in order to achieve this, sub-section (5) of Section 12 lays down that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject-matter of the dispute falls under any of the categories specified in the Seventh Schedule, he shall be ineligible to be appointed as an arbitrator. It is further observed that in such an eventuality i.e. when the arbitration clause finds foul with the amended provisions [sub-section (5) of Section 12 read with Seventh Schedule] the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator as may be permissible. It is further observed that, that would be the effect of non obstante clause contained in sub-section (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of the arbitration agreement.

10. It is further observed and held by this Court in *Voestalpine Schienen GmbH* [*Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd.*, (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] that independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which apply to all judicial and quasi-judicial proceedings. It is further observed that it is for this reason that notwithstanding the fact that relationship between the parties, to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator would render him ineligible to conduct the arbitration. It is further observed that the genesis behind this rationale is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties.

11. In paras 16 to 18 it is observed and held as under : (*Voestalpine Schienen GmbH case* [*Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd.*, (2017) 4 SCC 665 : (2017) 2 SCC (Civ) 607] , SCC pp. 679-83)

'16. Apart from other amendments, Section 12 was also amended and the amended provision has already been reproduced above. This amendment is also based on the recommendation of the Law Commission which specifically dealt with the issue of "neutrality of arbitrators" and a discussion in this behalf is contained in paras 53 to 60 and we would like to reproduce the entire discussion hereinbelow:

**"NEUTRALITY OF ARBITRATORS**

53. It is universally accepted that any quasi-judicial process, including the arbitration process, must be in accordance with principles of natural justice. *In the context of arbitration, neutrality of arbitrators viz. their independence and impartiality, is critical to the entire process.*

54. In the Act, the test for neutrality is set out in Section 12(3) which provides—

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'12. (3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality....'

55. The Act does not lay down any other conditions to identify the "circumstances" which give rise to "justifiable doubts", and it is clear that there can be many such circumstances and situations. The test is not whether, given the circumstances, there is any *actual* bias for that is setting the bar too high; but, whether the circumstances in question give rise to any *justifiable apprehensions of bias*.

56. The limits of this provision have been tested in the Indian Supreme Court in the context of contracts with State entities naming particular persons/designations (associated with that entity) as a potential arbitrator. It appears to be settled by a series of decisions of the Supreme Court [see *Executive Engineer, Irrigation Division v. Gangaram Chhapolia* [*Executive Engineer, Irrigation Division v. Gangaram Chhapolia*, (1984) 3 SCC 627] ; *State of T.N. v. Munuswamy Mudaliar* [*State of T.N. v. Munuswamy Mudaliar*, 1988 Supp SCC 651] ; *International Airports Authority v. K.D. Bali* [*International Airports Authority v. K.D. Bali*, (1988) 2 SCC 360] ; *S. Rajan v. State of Kerala* [*S. Rajan v. State of Kerala*, (1992) 3 SCC 608] ; *Indian Drugs & Pharmaceuticals Ltd. v. Indo Swiss Synthetics Gem Mfg. Co.Ltd.* [*Indian Drugs & Pharmaceuticals Ltd. v. Indo Swiss Synthetics Gem Mfg. Co. Ltd.*, (1996) 1 SCC 54] ; *Union of India v. M.P. Gupta* [*Union of India v. M.P. Gupta*, (2004) 10 SCC 504] ; *ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd.* [*ACE Pipeline Contracts (P) Ltd. v. Bharat Petroleum Corpn. Ltd.*, (2007) 5 SCC 304] ] that arbitration agreements in government contracts which provide for arbitration by a serving employee of the department, are valid and enforceable. While the Supreme Court, in *Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd.* [*Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd.*, (2009) 8 SCC 520 : (2009) 3 SCC (Civ) 460] carved out a minor exception in situations when the arbitrator

"was the controlling or dealing authority in regard to the subject contract or if he is a direct subordinate (as contrasted from an officer of an inferior rank in some other department) to the officer whose decision is the subject-matter of the dispute" (SCC p. 533, para 34)

and this exception was used by the Supreme Court in *Denel (Pty) Ltd. v. Ministry of Defence* [*Denel (Pty) Ltd. v. Ministry of Defence*, (2012) 2 SCC 759 : (2012) 2 SCC (Civ) 37] and *Bipromasz Bipron Trading Sa v. Bharat Electronics Ltd.* [*Bipromasz Bipron Trading Sa v. Bharat Electronics Ltd.*, (2012) 6 SCC 384 : (2012) 3 SCC (Civ) 702] , to appoint an independent arbitrator under Section 11, this is not enough.

57. The balance between procedural fairness and binding nature of these contracts, appears to have been tilted in favour of the latter by the Supreme Court, and the Commission believes the present position of law is far from satisfactory. Since the principles of impartiality and independence cannot be discarded at any stage of the proceedings, specifically at the stage of constitution of the Arbitral Tribunal, it would be incongruous to

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say that party autonomy can be exercised in complete disregard of these principles — even if the same has been agreed prior to the disputes having arisen between the parties. *There are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties' apparent agreement. A sensible law cannot, for instance, permit appointment of an arbitrator who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed.* The Commission hastens to add that Mr P.K. Malhotra, the ex officio member of the Law Commission suggested having an exception for the State, and allow State parties to appoint employee arbitrators. The Commission is of the opinion that, on this issue, there cannot be any distinction between State and non-State parties. The concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes. In fact, when the party appointing an adjudicator is the State, the duty to appoint an impartial and independent adjudicator is that much more onerous — and the right to natural justice cannot be said to have been waived only on the basis of a "prior" agreement between the parties at the time of the contract and before arising of the disputes.

58. Large-scale amendments have been suggested to address this fundamental issue of neutrality of arbitrators, which the Commission believes is critical to the functioning of the arbitration process in India. In particular, amendments have been proposed to Sections 11, 12 and 14 of the Act.

59. The Commission has proposed the requirement of having specific disclosures by the arbitrator, at the stage of his *possible* appointment, regarding existence of any relationship or interest of any kind which is likely to give rise to justifiable doubts. *The Commission has proposed the incorporation of the Fourth Schedule, which has drawn from the red and orange lists of the IBA Guidelines on Conflicts of Interest in International Arbitration, and which would be treated as a "guide" to determine whether circumstances exist which give rise to such justifiable doubts.* On the other hand, in terms of the proposed Section 12(5) of the Act and the *Fifth Schedule which incorporates the categories from the red list of the IBA Guidelines (as above), the person proposed to be appointed as an arbitrator shall be ineligible to be so appointed, notwithstanding any prior agreement to the contrary.* In the event such an ineligible person is purported to be appointed as an arbitrator, he shall be de jure deemed to be unable to perform his functions, in terms of the proposed Explanation to Section 14. Therefore, while the *disclosure* is required with respect to a broader list of categories (as set out in the Fourth Schedule, and as based on the red and orange lists of the IBA Guidelines), the *ineligibility* to be appointed as an arbitrator (and the consequent de jure inability to so act) follows from a smaller and more serious subset of situations (as set out in the Fifth Schedule, and as based on the red list of the IBA Guidelines).

60. The Commission, however, feels that *real* and *genuine* party autonomy must be respected, and, in certain situations, parties

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should be allowed to waive even the categories of ineligibility as set in the proposed Fifth Schedule. This could be in situations of family arbitrations or other arbitrations where a person commands the blind faith and trust of the parties to the dispute, despite the existence of objective "justifiable doubts" regarding his independence and impartiality. To deal with such situations, the Commission has proposed the proviso to Section 12(5), where parties may, *subsequent to disputes having arisen between them*, waive the applicability of the proposed Section 12(5) by an express agreement in writing. In all other cases, the general rule in the proposed Section 12(5) must be followed. In the event the High Court is approached in connection with appointment of an arbitrator, the Commission has proposed seeking the disclosure in terms of Section 12(1) and in which context the High Court or the designate is to have "due regard" to the contents of such disclosure in appointing the arbitrator."

17. We may put a note of clarification here. Though, the Law Commission discussed the aforesaid aspect under the heading "Neutrality of Arbitrators", the focus of discussion was on impartiality and independence of the arbitrators which has relation to or bias towards one of the parties. In the field of international arbitration, neutrality is generally related to the nationality of the arbitrator. In international sphere, the "appearance of neutrality" is considered equally important, which means that an arbitrator is neutral if his nationality is different from that of the parties. However, that is not the aspect which is being considered and the term "neutrality" used is relatable to impartiality and independence of the arbitrators, without any bias towards any of the parties. In fact, the term "neutrality of arbitrators" is commonly used in this context as well.

18. Keeping in mind the aforequoted recommendation of the Law Commission, with which spirit, Section 12 has been amended by the Amendment Act, 2015, it is manifest that the main purpose for amending the provision was to provide for neutrality of arbitrators. In order to achieve this, sub-section (5) of Section 12 lays down that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject-matter of the dispute falls under any of the categories specified in the Seventh Schedule, he shall be ineligible to be appointed as an arbitrator. In such an eventuality i.e. when the arbitration clause finds foul with the amended provisions extracted above, the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator(s) as may be permissible. That would be the effect of non obstante clause contained in sub-section (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of arbitration agreement.'

12. In *Bharat Broadband Network [Bharat Broadband Network Ltd. v. United Telecoms Ltd., (2019) 5 SCC 755 : (2019) 3 SCC (Civ) 1]*, it is observed that sub-section (5) of Section 12 read with Seventh Schedule made it clear that if the arbitrator falls in any one of the categories specified in the Seventh Schedule, he becomes "ineligible" to act as an arbitrator. It is further observed that once he becomes "ineligible", it is

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clear that he then become de jure unable to perform his functions inasmuch as in law, he is regarded as "ineligible". It further is observed in the said decision that where a person becomes ineligible to be appointed as an arbitrator there is no question of challenge to such arbitrator before such arbitrator in such a case i.e. a case which falls under Section 14(1) (a) of the Act gets attracted inasmuch as the arbitrator becomes, as a matter of law (i.e. de jure), unable to perform his functions under Section 12(5), being ineligible to be appointed as an arbitrator and this being so, his mandate automatically terminates, and he shall then be substituted by another arbitrator."

13. Clause 33 in the present agreement while contemplating reference of dispute to arbitration essentially restricts its applicability to an adjudication by the departmental officer i.e. Chief Executive Officer or his nominee. The further stipulation in Clause 33 that where reference to such officer is not possible the arbitration itself would not be available. This stipulation clearly manifests the intent of employer i.e. YEIDA to retain the power of adjudication, which goes against the spirit of neutrality of arbitrator for which alone Section 12(5) of the Act of 1996 is introduced. The observation of the Supreme Court in Ellora Paper Mills (supra) while referring to the discussions made by the Law Commission assumes significance. Principles of impartiality or independence has to be respected in the matter of appointment of arbitrator and it would be incongruous to hold that party autonomy can be exercised in complete disregard of these principles.

14. Once the statute has stepped in to enforce neutrality of arbitrator in an arbitration agreement, by virtue of Section 12(5) of the Act, the Court would not be justified in literally interpreting the clause in the agreement to keep the power of adjudication or the party autonomy with the employer at the cost of abandoning the arbitration itself. Clause 33 of the agreement ousting arbitration in case of neutrality of arbitrator has thus to be necessarily construed as being subservient to Section 12(5) of the Act of 1996. In any case, the intent of parties to refer their dispute to arbitration cannot

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be nullified in the anxiety to retain power of adjudication by the employer i.e. YEIDA.

15. This Court is in respectful agreement with the view expressed by Delhi High Court in Ram Kripal Singh (*supra*), wherein the Court observed as under:-

"17.4. The procedure for appointment of an arbitrator is clearly distinct and separable from the agreement to refer disputes to arbitration, even if these are contained in the same arbitration clause. If therefore, by reason of amendment, re-statement or re- interpretation of the law, as has happened in the present case by insertion of section 12(5) in the A&C Act and the verdicts of the Supreme Court in TRF Ltd. and Perkins Eastman (*supra*), the procedure for appointment of arbitrator at the hands of one of the parties becomes legally invalid, void and unenforceable, that does not mean that the core agreement between the parties to refer their inter-se disputes to arbitration itself perishes. In the opinion of this court - this "my way or the highway" approach - is not tenable in law; and in such circumstances, that part of the arbitration agreement which has been rendered invalid, void and enforceable is to be severed or excised from the arbitration clause, while preserving the rest of the arbitration agreement;

17.5. Accordingly, this court is of the view, that there is a valid and subsisting arbitration agreement between the parties, though the procedure for appointment of the arbitrator at the hands of the CMD, NTPC is no longer valid, and must therefore be severed from the remaining arbitration clause;"

16. The judgment of this Court in Nandini Constructions, relied upon by YEIDA will thus not hold the field in view of subsequent judgments of the Supreme Court, referred to above, and the objection of Sri Singhal, therefore, cannot be accepted.

17. So far as the objection of Sri Singhal that scope of work is not covered under the agreement would also be an aspect open to be raised and examined during the course of the arbitration and no definite opinion in that regard is required to be expressed by this Court while deciding the application under Section 11 of the Act. Issue with regard to filing of

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alleged affidavit by the applicant, for not raising any such claim, is also left open for adjudication by the arbitrator after evidence, etc., is adduced in that regard.

18. For the reasons recorded above, this application succeeds and is allowed.

19. Accordingly, Hon'ble Mr. Justice P.K.S. Baghel (Former Judge), R/o 8-B/6A Parthsarathi House, Mayo Road, Near Mayo Hall Sports Complex, Allahabad, Mobile No. 9936931931, is appointed as an Arbitrator to enter upon the reference and adjudicate the dispute in accordance with provisions of Arbitration and Conciliation Act, 1996, subject to his consent in terms of section 11-A of the Arbitration and Conciliation Act.

20. The Arbitrator shall be entitled to fees, in accordance with the provisions of fourth schedule inserted by Act No.3 of 2016. The expenses shall be borne equally by the parties.

**Order Date:- 4.8.2023**

Ranjeet Sahu