

GAHC010292522023



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

Case No. : Arb.P./51/2023

M/S BARPETA AGRO INFRA,
A PARTNERSHIP FIRM REGISTERED UNDER THE INDIAN PARTNERSHIP
ACT, 1932
HAVING ITS REGISTERED OFFICE AT PLOT NO. 63, JUBILEE HILLS,
HYDERABAD. PIN- 500033
AND IS BEING REPRESENTED HEREIN BY ITS SPECIAL POWER OF
ATTORNEY HOLDER AND MANAGER OPERATIONS SRI GOPINADH
MODUGU, SON OF SRI MODUGU BHANU SUNDAR KUMAR (AGED ABOUT
41 YEARS).

VERSUS

THE UNION OF INDIA AND 2 OTHERS
REPRESENTED BY THE GENERAL MANAGER, N. F. RAILWAYS,
MALIGAON, GUWAHATI, DISTRICT- KAMRUP(M), ASSAM.
PIN- 781011.

2:THE PRINCIPAL CHIEF COMMERCIAL MANAGER
N.F. RAILWAY

N. F. RAILWAYS HEADQUARTERS
MALIGAON
GUWAHATI
DISTRICT- KAMRUP METRO
ASSAM. PIN 781011.

3:THE SENIOR DIVISIONAL COMMERCIAL MANAGER

N.F. RAILWAY
RANGIYA
OFFICE OF THE DIVISIONAL RAILWAY MANAGER
RANGIA MAIN ROAD

RANGIA
ASSAM
PIN 78136

Advocate for the Petitioner : MR A BANERJEE

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

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA

ORDER

11.03.2024

Heard Mr. A. Biswas, learned counsel for the petitioner. Also heard Mr. B. Chakraborty, learned CGC appearing for all the respondents.

2. The present petition is for appointment of an Arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the '1996 Act').

3. The petitioner's case is that the petitioner entered into a contract agreement with the respondents to build and operate a 25,000 MT Capacity godown with private Siding under the Private Entrepreneurship Godown Scheme of the FCI. Consequently, contract agreement dated 02.07.2018 was executed between the parties. Disputes having arisen between the parties, the petitioner has filed this application for appointment of an Arbitrator, as Clause 34 of the contract agreement provides for resolution of disputes between the parties by way of arbitration by constituting an Arbitral Tribunal, made up of members to be appointed by the General Manager, Northeast Frontier Railway.

4. The petitioner's counsel submits that though Clause 34 of the contract

agreement provides that the dispute between the parties is to be referred to a 3 member Arbitral Tribunal to be constituted by the General Manager, N.F. Railway, the Arbitrator would have to be appointed by this Court and not by the General Manager, N.F. Railway. He submits that this is due to the fact that the General Manager, N.F. Railway cannot be appointed as an Arbitrator as he has interest in the dispute and is not a neutral person. As such, the General Manager, N.F. Railway cannot in turn appoint any other Arbitrator in terms of the law laid down by the Hon'ble Supreme Court in the case of ***Perkins Eastmen Architects DPC and Anr Vs. HSCC (India) Limited***, reported in ***(2020) 20 SCC 760*** and ***TRF Ltd. Vs. Energo Engg. Projects Ltd., reported in (2017) 8 SCC 377***, while discussing Section 12(5) of the 1996 Act and the 7th Schedule.

5. Mr. B. Chakraborty, learned CGC for the respondents submits that in terms of Clause 34 of the contract agreement, an Arbitral Tribunal is to be constituted consisting of 3 members to be appointed by the General Manager, N.F. Railway. He submits that as the contract agreement specifically provides for appointment of Arbitrators by the General Manager, N.F. Railway, the same has been done by the respondents. He also submits that there are conflicting decisions with regard to appointment of an Arbitral Tribunal by the Supreme Court, i.e., in the case of ***Central Organization for Railway Electrification Vs. Ms. ECI-SPIC-SMO-MCML (JV) a Joint Venture Company***, reported in ***(2020) 14 SCC 712*** and in the case of ***Perkins Eastmen (supra)***. He submits that as there are conflicting decisions between the 3 Judges Benches of the Supreme Court, pertaining to the interpretation of Section 12(5) and 7th Schedule of the 1996 Act, the earlier judgment passed by the Supreme Court would have to be

followed by this Court. He further submits that the conflicting decisions of the Supreme Court has been referred to a larger Bench, which has not decided the issue till date.

6. I have heard the learned counsels for the parties.

7. The issue to be decided is with regard to whether the General Manager, N.F. Railway could appoint 3 officers (retired/serving), as members of the Arbitral Tribunal in terms of Clause 34 of the contract agreement dated 02.07.2018.

8. Clause 34 of the contract agreement dated 02.07.2018 states as follows-

34. Arbitration:

(c) In the event of any dispute or difference of opinion between the parties as to the respective rights and obligations of the parties hereunder or as to the true intent and meaning of these presents or any or conditions thereof arising such dispute or difference of opinion (except the matters regarding which the decision has been specifically provided for in this agreement shall be referred to the an arbitral tribunal consisting of at least 3 members to be appointed by the General Manager, NF Railway for the time being, and his decision shall be final conclusive and binding on the parties. For the purpose of this Agreement, the General Manager will mean the head of the NF Railway Administration.

(d) In case of dispute with any enterprise of Govt. of India, the arbitration proceeding shall be as per the extant rules in force for settlement of disputes amongst the two government organisations, as circulated by the competent authority in this regard.

(e) If one or more of the arbitrators appointed by the General Manager resigns from his appointment as an arbitrator or vacates his office, or is unable of unwilling to act so for any reason whatsoever or dies, the General Manager will

have the power to appoint a new arbitrator to act in his place. Such arbitral tribunal shall be entitled to proceed with the reference from the stage at which it was left by the previous arbitrator.

(f) Place of arbitration proceeding shall be the Zonal Railway Headquarter or at a place where the agreement has been signed.

(g) The arbitral tribunal may from time to time, with the consent of parties_____ to these presents enlarge time for making and publishing the award:”

9. Section 12(5) of the 1996 Act as amended in the year 2015 is reproduced hereinbelow as follows-

***"12(5)** 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 shall be ineligible to be appointed as an arbitrator:*

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.”

10. As can be seen from Clause 34 of the contract agreement, any dispute between the parties has to be decided by an Arbitral Tribunal, consisting of three members to be appointed by the General Manager, N.F. Railway. Section 12(5) of the 1996 Act read with the 7th Schedule provides the list of persons who are ineligible to be appointed as Arbitrators.

11. 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. (supra)*** and held that by virtue of the Amending Act (3 of 2016), the Managing Director,

HSCC (India) Limited, which was an executing agency for the Ministry of Health & Family Welfare, 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. This was due to the fact that he would be having an interest in the dispute.

12. In the case of **TRF Limited (supra)** the Hon'ble Supreme Court had to decide two issues, which were as follows-

“1. Whether once the person who was required to arbitrate upon the disputes arisen under the terms and conditions of the contract becomes ineligible by operation of law, he would not be eligible to nominate a person as an arbitrator, i.e. whether the Managing Director of the respondent, who had become ineligible to act as an arbitrator subsequent to the Arbitration and Conciliation (Amendment) Act, 2015, could not have also nominated any other person as arbitrator?”

2. Whether challenge to an appointment of arbitrator nominated by Managing Director, under could only be made before the Arbitral Tribunal or the same could be raised before the court in application preferred under Section 11(6) of the Act.”

13. The 3 Judges Bench of the Supreme Court in **TRF Limited (supra)** thus answered the issues by holding that by virtue of Section 12(5) of the 1996 Act, if any person, who falls under any of the categories specified in the 7th Schedule, shall be ineligible to be appointed as the Arbitrator, by operation of law. Secondly a person, ineligible to become an Arbitrator, cannot nominate another as an Arbitrator.

14. Para 54 of the judgment of the Supreme Court in **TRF Limited (supra)** is reproduced hereinbelow as follows-

“54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so.”

15. 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 the 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*."

16. 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.

17. In terms of the judgments of the Hon'ble Supreme Court in the case of ***TRF Limited (supra)*** & ***Perkins Eastman (supra)*** and the fact that the application for appointment of an Arbitrator has been made subsequent to the amendment of Section 12 of the 1996 Act, this Court is of the view that the Managing Director, N.F. Railway could not appoint/nominate Arbitrators, to decide the dispute between the parties herein.

18. In the case of ***Central Organization for Railway Electrification (supra)***, the 3 Judges Bench of the Hon'ble Supreme Court held that when a contract agreement specifically provides for appointment of an Arbitral Tribunal consisting of 3 Arbitrators from out of the panel of serving or retired railway officers, the appointment of the Arbitrator should be done in terms of the agreement as agreed by the parties. This judgment is in complete variance with the judgments passed in ***TRF Limited (supra)*** and ***Perkins Eastman***

(supra).

19. Due to the conflicting decisions of the Hon'ble Supreme Court and the subsequent decisions of the other Benches of the Supreme Court, like in the case of ***Union of India Vs. Tantia Constructions Ltd.***, reported in ***(2021) SCC OnLine SC 271***, the conflicting decisions have been referred to a larger Bench for final resolution of the issue, with regard to whether the express terms provided in a contract agreement would hold sway, while constituting an Arbitral Tribunal in terms of Section 12(5) and the 7th Schedule of the 1996 Act.

20. The issue that now arises is as to which judgment should be followed by this Court. In this regard, the learned CGC has taken this Court through the judgment of the Hon'ble Supreme Court in the case of ***Union Territory of Ladakh & Ors Vs. Jammu and Kashmir National Conference & Anr***, reported in ***2023 Legal Eagle (SC) 891***, wherein it has been held that when faced with conflicting judgments by Benches of equal strength of the Supreme Court, the earlier judgment has to be followed by the High Court, which would be in consonance with the decision of the Five Judges Bench of the Supreme Court in the case of ***National Insurance Company Ltd. Vs. Pranay Sethi***, reported in ***(2017) 16 SCC 680***.

21. Para 35 of the judgment of the Ho'ble Supreme Court in the case of ***Union Territory of Ladakh (supra)*** states as follows-

“35. We are seeing before us judgments and orders by High Courts not deciding cases on the ground that the leading judgment of this Court on this subject is either referred to a larger Bench or a review petition relating thereto is pending. We have also come across examples of High Courts refusing deference to judgments of this Court on the score that a

later Coordinate Bench has doubted its correctness. In this regard, we lay down the position in law. We make it absolutely clear that the High Courts will proceed to decide matters on the basis of the law as it stands. It is not open, unless specifically directed by this Court, to await an outcome of a reference or a review petition, as the case may be. It is also not open to a High Court to refuse to follow a judgment by stating that it has been doubted by a later Coordinate Bench. In any case, when faced with conflicting judgments by Benches of equal strength of this Court, it is the earlier one which is to be followed by the High Courts, as held by a 5-Judge Bench in National Insurance Company Limited v. Pranay Sethi, (2017) 16 SCC 680. The High Courts, of course, will do so with careful regard to the facts and circumstances of the case before it."

22. In the present case, there was a request by the Railways made to the petitioner, vide letter dated 27.06.2023, to waive the applicability of Section 12(5) of the 1996 Act. The same was however refused by the petitioner vide letter dated 03.07.2023. The Managing Director, N.F. Railway has further made a panel of names for appointment as Arbitrators. The above being said, the request to refer the dispute to arbitration has been made subsequent to the 2015 amendment and as such, this Court is of the view that the earliest judgment of the Supreme Court for appointment of an Arbitrator in terms of Section 11 and the amended Section 12 of the 1996 Act would have to be applied in this case.

23. By applying the judgment of the supreme Court in the case of ***Union Territory of Ladakh (supra)***, this Court is bound to follow the earlier judgment of the Supreme Court with regard to whether the Managing Director of N.F. Railway could have constituted the members of the Arbitral Tribunal in terms of Clause 34 of the contract agreement dated 02.07.2018 or in terms of

Section 12(5) and the 7th Schedule of the 1996 Act.

24. As the earliest judgment of the Supreme Court on this issue after the 2015 amendment is ***TRF Limited (supra)***, this Court holds that the making of the panel/appointment of the serving/retired officials of the Railways, as members of the Arbitral Tribunal, is hit by Section 12(5) and the 7th Schedule of the 1996 Act, as their neutrality are in question. When the General Manager, N.F. Railway himself cannot be made an Arbitrator in view of Section 12(5) and the 7th Schedule to the 1996 Act, the panel/appointment of serving/retired officials of the Railways as Arbitrators cannot be made by the said official.

25. In view of the reasons stated above, the making of the panel/appointment of the members of the Arbitral Tribunal by the respondents is set aside. Consequently, in terms of Section 11(6) of the 1996 Act, this Court appoints Sri Mrinmoy Kumar Bhattacharjee, retired District & Sessions Judge as Arbitrator, who will decide the disputes that has arisen between the parties. The parties shall appear before the said Arbitrator within a period of 3(three) weeks from today. The issue as to whether the Arbitrator is handicapped by the provisions of Section 12(5) and the 7th Schedule of the 1996 Act is left at the hands of the parties, which doubt, if any, should be cleared at the earliest instance, in terms of Section 12 of the 1996 Act.

26. The amended Section 12(1) of the 1996 Act provides for 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.”

27. The arbitration petition is accordingly disposed of.

JUDGE

Comparing Assistant