

IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

Arbitration Case No. 156 of 2022
Decided on 23rd December, 2022

Sh. Bhagat Singh Negi

.....Petitioner.

Versus

The State of Himachal Pradesh & another

.....Respondents.

Coram

The Hon'ble Mr. Justice A.A. Sayed, Chief Justice

¹ *Whether approved for reporting?*

For the petitioner:

Mr. Tarunjeet Singh Bhogal and Ms. Swati Verma, Advocates.

For the respondents:

Mr. Yudhvir Singh Thakur, Deputy Advocate General.

A.A. Sayed, Chief Justice *(oral)*

This is an application filed by the petitioner, under Section 11 (6) of the Arbitration and Conciliation Act, 1996 ('the Act' for short), seeking appointment of an Arbitrator to adjudicate the disputes between the parties.

2. Pursuant to a tender issued by the respondents, the petitioner was allotted the work of "Construction of Chitkul Dumti Road km 0/0/ to 20/750 (Alongwith Indo-China Border) (SH: Formation Cutting i/e C/o retaining Wall, cross drainage work, C/o 1

¹ *Whether reporters of Local Papers may be allowed to see the judgment?*

Nos causeways and bailey bridge abutment in km 5/0 to 10/0)(slice II)".

3. An agreement was executed between the parties. It is not in dispute that Clause 25 of the Agreement provides for reference to the sole Arbitration of a person appointed by the Engineer-in-Chief/Chief Engineer, HPPWD.

4. Disputes and differences arose between the parties under the Agreement. The petitioner invoked arbitration vide notice dated 18.07.2021, suggesting one out of the names of three Advocates as mentioned in the notice, for being appointed as an Arbitrator.

5. There was no reply to the said notice by the respondents and the respondents failed to act upon the said notice. In the affidavit-in-reply, filed by the respondents, except for stating that no case is made out for appointment of an Arbitrator and that a false claim is being raised by the petitioner, the affidavit-in-reply deals only with the merits.

6. In ***Perkins Eastman Architects DPC and another Versus HSCC (India) Limited, (2020) 20 Supreme Court Cases 760***, the Supreme Court in paragraphs 20 and 21 held as follows:-

"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, 2017 8 SCC 377 , 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 our view that has to be the logical deduction from TRF Limited, 2017 8 SCC 377 . Paragraph 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 (Act 3 of 2016) and recognised by the decision of this Court in TRF Limited.”

7. In view of clause 12(5) of the Act and the enunciation of law by the Supreme Court in the aforesaid case of Perkins Eastman Architects DPC, the Engineer-in-Chief/Chief Engineer would be ineligible for being nominated as a Arbitrator.

8. In the facts and circumstances, a case has been made out by the petitioner for this Court to exercise jurisdiction under

Section 11(6) of the Act to appoint an independent Arbitrator. Hence, the following order is passed: -

ORDER

- (i) Mr. Lovneesh Kanwar, Senior Advocate, is appointed as a sole Arbitrator to adjudicate the disputes and differences between the parties.
- (ii) The learned Arbitrator, before entering the arbitration reference, shall forward a statement of disclosure as per the requirement of Section 11(8) read with Section 12(1) of the Act to the Registrar (Judicial) of this Court (to be placed on record of this application) and copies thereof be forwarded to the parties.
- (iii) The parties shall appear before the Arbitrator on a date which may be fixed by the learned Arbitrator, which shall not be later than four weeks from the date of receipt of this order by him.
- (iv) The fees payable to the Arbitral Tribunal shall be as prescribed in the Fourth Schedule appended to the Act.
- (v) Office to forward a copy of this order to the learned Arbitrator on the following address:-

**“Mr. Lovneesh Kanwar,
Senior Advocate,
Dyerton Apartments,
Dyerton Estate,
Khalini, Shimla”**

9. The application is allowed in the above terms.

**(A.A. Sayed)
Chief Justice**

23rd December, 2022
(*pri*)