

IN THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 27.01.2021

+ **ARB.P. 2/2021**

**M/S VSK TECHNOLOGIES PRIVATE LIMITED
& ORS.**

..... Petitioner

Versus

DELHI JAL BOARD

..... Respondent

Advocates who appeared in this case:

For the Petitioner: Ms. Manmeet Arora, Ms. Samapika Biswal and Mr. Harkirat Singh, Advocates.

For the Respondent: Mr. Ramesh Singh and Mr. R. A. Iyer, Advocates.

**CORAM
HON'BLE MR JUSTICE VIBHU BAKHRU**

JUDGMENT

VIBHU BAKHRU, J

1. The petitioner has filed the present application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereafter ‘the A&C Act’), *inter alia*, praying that a Sole Arbitrator be appointed to adjudicate the disputes that have arisen between the parties in relation to an Agreement dated 28.08.2012 entered into between the parties for performing the work of “Water Tanker Supply Services (WTSS)” for Zone-I (hereinafter ‘the Contract’).

2. The respondent (hereafter ‘DJB’) issued a Request for Proposal (RFP) bearing NIT No.07/RPC-I/(2011-12) inviting competitive tenders from agencies for operating Stainless Steel (SS) Water Tanker Services on hire basis for the purposes of supplying water through vehicle mounted water tankers in order to facilitate supply of potable drinking water to different areas in Delhi. Such services were to be provided in five different Zones – Zone I, Zone II, Zone V, Zone VII and Zone VIII on identical terms. The subject dispute relates to Zone I.

3. The petitioner submitted its bid pursuant to the RFP. After negotiations, an offer made by the petitioner was accepted and the DJB issued a Letter of Intent (LoI) dated 16.07.2012. Thereafter, the DJB issued a Work Order under the cover of its letter dated 21.08.2012 and on 27.08.2012, the parties entered into a formal agreement with respect to performance of the work “Water Tanker Supply Services (WTSS) for Zone-I.”

4. The petitioner claims that it has been diligently performing the contract, however, the DJB has failed to make payments of the invoices raised by the petitioner. The petitioner claims that it had issued a notice calling upon the DJB to release the payments outstanding for the months of August, September and October, 2020 and had also made representations in this regard. However, the petitioner claims that the DJB has failed to address the issues raised by it.

5. In view of the disputes that have arisen between the parties, the petitioner issued a notice dated 20.11.2012 invoking the Arbitration Agreement as set out in Clause 8.1.2 of the Contract. It also suggested the name of a former Chief Justice of this Court for being appointed as an Arbitrator.

6. Thereafter, on 25.11.2020, the petitioner filed a petition (OMP (I) (COMM.) 390/2020) under Section 9 of the A&C Act before this Court seeking certain interim measures of protection. The said matter was listed for hearing on 01.12.2020 and 02.12.2020. On 02.12.2020, this Court issued notice but did not grant any interim relief, as prayed for by the petitioner. The petitioner has also preferred an appeal – FAO(OS)(COMM.) 174/2020 – under Section 37 of the A&C Act – challenging the said order dated 02.12.2020.

7. The name of the Sole Arbitrator as suggested by the petitioner was not accepted by the DJB. However, the DJB sent a letter dated 15.12.2020 responding to the petitioner's notice dated 20.11.2020, whereby the petitioner had invoked the Arbitration Clause. The DJB proposed names of two persons, one being a former Chief Justice of the Patna High Court and the other being a former Judge of this Court to be appointed as Arbitrators. However, the same were not acceptable to the petitioner. Therefore, on 24.12.2020, the petitioner moved this application for appointment of an Arbitrator.

8. After the petitioner had filed the present application, the DJB issued a letter dated 31.12.2020 nominating Justice (Retired) Iqbal

Ahmed Ansari as a Sole Arbitrator to adjudicate the disputes between the parties. It is material to note that he was one of the two persons who were proposed by the DJB for being appointed as an Arbitrator, in its letter dated 15.12.2020

9. The respondent does not dispute the existence of the Arbitration Clause contained in Clause 8.1.2 of the Contract is relevant and is set out below:-

“8.1 DISPUTE RESOLUTION”

- 1) Any dispute arising out of or in connection with this Agreement shall in the first instance be dealt with in accordance with the escalation procedure as set out in the Governance Schedule.
- 2) Any dispute or difference whatsoever arising between to this Contract out of or relating to the construction, meaning, scope, operation or effect of this Contract or the validity of the breach thereof, which cannot be resolved through the application of the provisions of the Governance Schedule, shall be referred to a sole Arbitrator to be appointed by mutual consent of both the parties herein. If the parties cannot agree on the appointment of the Arbitrator within a period of one month from the notification by one party to the other of existence of such dispute, then the Arbitrator shall be nominated by DJB. The provisions of the Arbitration and Conciliation Act, 1996 will be applicable and the award made there under shall be final and binding upon the parties hereto, subject to legal remedies available under the law. Such differences shall be deemed to be a submission to arbitration under the

Indian Arbitration and Conciliation Act, 1996 or of any modifications, Rules or re-enactments thereof. The Arbitration proceedings will be held at Delhi, India.”

10. Ms. Arora, learned counsel appearing for the petitioner referred to the decisions of the Supreme Court in ***Perkins Eastman Architects DPC &Anr. v. HSCC (India) Limited: Arbitration Application No 32 of 2019 decided on 26.11.2019*** and a decision of this Court in ***Proddatur Cable TV Digi Services v. Citi Cable Network Limited: (2020) 267 DLT 51*** and contended that the unilateral appointment of an Arbitrator by the DJB was not permissible.

11. Mr Singh, learned counsel appearing for the DJB countered the aforesaid submissions. He contended that the decision of the Supreme Court in ***Perkins Eastman Architects DPC &Anr. v. HSCC (India) Limited (supra)*** was not applicable in the facts of the present case. He submitted that the said decision must be read in a restricted manner. And, the said decision would be applicable only in cases under Section 11(6)(a) of the A&C Act, that is, in cases where there had been failure on the part of a party to act in accordance with the agreed procedure for appointment of an Arbitrator.

12. He submitted that the said decision must also be read in context with an earlier decision of the Supreme Court in ***TRF Ltd. v. Energo Engineering Projects Ltd.: (2017) 8 SCC 377***. He submitted that in ***Perkins Eastman Architects DPC &Anr. v. HSCC (India) Limited (supra)***, the issue before the Court was regarding ineligibility of an

Arbitrator to act as such under Section 12(5) of the A&C Act. He submitted that there was no dispute that a person whose relationship with any of the parties fell within the categories as specified in the Seventh Schedule of the A&C Act would be ineligible to be appointed as an Arbitrator. He submitted that the said rationale was further extended by the Supreme Court in ***TRF Ltd. v. Energo Engineering Projects Ltd.*** (*supra*) and the Supreme Court held that once a person is ineligible by operation of law to act as an Arbitrator, he also cannot nominate another to nominate an Arbitrator. The Court had held that “*it was inconceivable in law that person who is statutorily ineligible can nominate a person.*” Mr. Singh submitted that the said decision was rendered in context of an Arbitration Clause, which provided that disputes and differences between the parties would be referred to “*sole arbitration of the Managing Director of buyer or his nominee*”. He submitted that in the case of ***Perkins Eastman Architects DPC & Anr. v. HSCC (India) Limited*** (*supra*), the Arbitration Clause provided for an arbitration “*by a sole arbitrator appointed by the CMD HSCC within 30 days from the receipt of the request*”. However, the CMD, HSCC, had failed to appoint an Arbitrator within the period specified and therefore, the concerned authority had lost its right to appoint an Arbitrator. He submitted that the decision was also founded on Section 12(5) of the A&C Act which, *inter alia*, rendered an employee of any party ineligible to act as an Arbitrator. Thus, the said decisions would not be applicable in the present case.

13. He earnestly contended that in the facts of the present case, the DJB had appointed a former Chief Justice of the Patna High Court as an Arbitrator from the panel of Arbitrators maintained by it and therefore, the question of an Arbitrator being ineligible under Section 12(5) of the A&C Act did not arise. He relied on the decision of the Supreme Court in ***Central Organization for Railway Electrification v. ECI-SPIC-SMO-MCML: Civil Appeal Nos. 9486-9487 of 2019 decided on 17.12.2019*** and contended that in cases where an Arbitrator has been appointed from a panel of Arbitrators, the appointment was necessarily required to be in terms of the agreement between the parties. He submitted that in this case, the DJB had a right to nominate an Arbitrator and therefore, the appointment of the Arbitrator could not be faulted. He also referred to the decision of the Supreme Court in ***Standard Corrosion Controls Pvt. Ltd. v. Sarku Engineering Services SDN BHD: (2009) 1 SCC 303*** and contended that a party could not approach the court under Section 11 of the A&C Act without following the procedure as agreed upon.

14. Ms Arora countered the aforesaid submissions. She submitted that the contention that the Arbitrators suggested by the DJB were from its panel is incorrect. She also referred to an Office Order being OO No.26 dated 17.12.2020, issued by the Office of the Law Officer, DJB and submitted that the said Office Order, for including the names of two former Judges suggested by the DJB on their panel, was issued on 17.12.2020 which was after the date when their names had been suggested by the DJB.

15. She also referred to a circular dated 25.08.2020, which sets out the procedure to be adopted for appointment of an Arbitral Tribunal in light of the judgments passed by the Supreme Court and the High Court. The said circular indicates that the concerned engineering officer is required to file a request to the High Court for appointment of an Arbitrator from the panel maintained by the Delhi International Arbitration Centre (DIAC) or at its own discretion.

16. Mr. Singh countered the aforesaid submissions and stated that averments to the aforesaid effect were not included in the petition filed by the petitioner but were made in the rejoinder and therefore, the DJB had no opportunity to traverse the said averments. However, he stated on instructions that although the order including the names of the two Arbitrators suggested by the DJB was passed on 17.12.2020 and the decision to include them in the panel had already been taken on file on 15.12.2020, that is, the date on which their names were suggested to the petitioner. He further submitted the Circular dated 25.08.2020 had no application in cases where the procedure for appointment of the Arbitrators had been agreed between the parties

17. It is not necessary for this Court to examine the question whether the names of the Arbitrators suggested had been included on the panel of Arbitrators maintained by the DJB subsequent to them being suggested to the petitioner. This is because the Arbitration Clause does not provide for appointment of Arbitrators from any panel. It is equally unnecessary to examine the scope of the Circular

dated 25.08.2020 as the scope of examination in these proceedings is limited.

18. The contention that the decision in the case of ***Perkins Eastman Architects DPC & Anr. v. HSCC (India) Limited*** (*supra*) ought to be read in a restrictive manner is not persuasive. On the contrary, the said decision must be read in expansive manner. The efficacy of arbitration as an alternate dispute resolution mechanism rests on the foundation that the disputes would be adjudicated by independent and impartial arbitrators. The decision in ***Perkins Eastman Architects DPC & Anr. v. HSCC (India) Limited*** (*supra*) recognizes the importance of ensuring that Arbitrators not be appointed by persons who are otherwise interested in the matter so as to obviate any doubt as to the impartiality and independence of the Arbitral Tribunal. The necessity for instituting necessary safeguards for the same cannot be understated.

19. In any view, the said issue is no longer *res integra* in view of the decision of a Coordinate Bench of this Court in ***Proddatur Cable TV Digi Services v. Citi Cable Network Limited*** (*supra*). In that case, the Court has observed as under:-

“25.The argument of the respondent that in the Arbitration Clause before the Supreme Court in the case of *Perkins* was with regard to the power of a Managing Director to appoint an Arbitrator whereas in the present case it is the Company only merits rejection. First and foremost, one has to see the rationale and the reasoning behind the judgment in the case of *Perkins* (*supra*). The

Supreme Court held that the Managing Director was ineligible from appointing an Arbitrator on the simple logic that a Managing Director of a Company would always have an interest in the outcome of the arbitration proceedings. The interest in this context takes the shape of bias and partiality. As a natural corollary, if the Managing Director suffers this disability, even if he was to appoint another person as an Arbitrator, the thread of biasness, partiality and interest in the outcome of the dispute would continue to run. Seen in this light, it can hardly be argued that the judgment in *Perkins* (supra) will not apply only because the designated Authority empowered to appoint an Arbitrator is other than a Managing Director.”

20. The aforesaid decision has also been followed in several other decisions. In *M/s Omcon Infrastructure Pvt. Ltd. v. Indiabulls Investment Advisors Ltd.*: OMP(T)(COMM.)35/2020, another Coordinate Bench of this Court considered an order passed by an Arbitrator rejecting the petitioner’s application under Section 12 of the A&C Act. In that case, the Arbitrator had been unilaterally appointed by the respondent. The petitioner contended that the unilateral appointment of an Arbitrator by the respondent company was contrary to the decision of the Supreme Court in *Perkins Eastman Architects DPC & Anr. v. HSCC (India) Limited* (supra). The Arbitrator rejected the said contention by holding that the decision of the Supreme Court in *Perkins Eastman Architects DPC & Anr. v. HSCC (India) Limited* (supra) was not applicable as the authority to appoint an Arbitrator was not vested with any designated employee but with the respondent company. This Court did not accept this view. The

Court referred to the decision in the case of *Proddatur Cable TV Digi Services v. Citi Cable Network Limited* (*supra*) and held as under:-

“9.The ratio of the decision in *Perkins Eastman Architects DPC & Anr.* (*supra*) cannot be read in such a narrow manner as has been sought to be done by the learned Arbitrator. In my view, once the Managing Director of the Respondent Company was ineligible to appoint the arbitrator in the light of the decision in *Perkins Eastman Architects DPC & Anr.* (*supra*), the same would also bar the Company itself from unilaterally appointing the sole arbitrator.”

21. The reliance placed by Mr. Singh on the decision in the case of *Central Organization for Railway Electrification v. ECI* (*supra*) is misplaced. In that case, the Arbitration Clause provided for the Arbitral Tribunal to be constituted by Gazetted Railway Officers or three retired Railway Officers above a certain rank. The petitioner (Railways) was required to send names of four empanelled retired Railway Officers and the contractor was required to suggest two names out of the said panel for appointment as its nominee. The General Manager was required to appoint one of the names out of the two names as suggested by the contractor as the contractor's nominee and the remaining Arbitrator from the panel or outside the panel. The Supreme Court noted that the procedure adopted also took into account the option of the contractor. The Court was of the view that since the agreement provided for the appointment of an Arbitral Tribunal out of the panel of serving/retired officers, the procedure as agreed by the parties ought to have been followed. In the present case,

the Clause does not entail any such procedure for suggesting any names out of the panel of Arbitrators maintained by the DJB. Therefore, the contention that the decision of the DJB to nominate an Arbitrator must be sustained since the Arbitrator appointed was one from the panel maintained internally, is unpersuasive. The question whether the DJB maintains a panel of Arbitrators is its internal matter. The Arbitration Clause does not contemplate the appointment of any Arbitrator from the panel of Arbitrators maintained by the DJB and therefore, the decision in the case of *Central Organization for Railway Electrification v. ECI* (*supra*) is, wholly inapplicable in the facts of the present case.

22. It is also relevant to mention that in *Union of India v. M/s Tantia Constructions Limited: SLP (C) 12670/2020 decided on 11.01.2021*, a three judge bench of the Supreme Court upheld the decision of the High Court to appoint an independent Arbitrator and had dismissed the Special Leave Petition. However, since reliance had been placed by the petitioner on the decision in *Central Organization for Railway Electrification v. ECI* (*supra*), the Supreme Court had requested the Chief Justice of India to constitute a larger Bench to look into the correctness of the said decision. The said order is reproduced below:-

“Having heard Mr. K.M. Nataraj, learned ASG for sometime, it is clear that on the facts of this case, the judgment of the High Court cannot be faulted with. Accordingly, the Special Leave Petition is dismissed. However, reliance has been placed upon a recent three-

Judge Bench decision of this Court delivered on 17.12.2019 in *Central Organisation for Railway Electrification vs.M/s ECI-SPIC-SMO-MCML (JV) A Joint Venture Company*, 2019 SCC OnLine 1635. We have perused the aforesaid judgment and *prima facie* disagree with it for the basic reason that once the appointing authority itself is incapacitated from referring the matter to arbitration, it does not then follow that notwithstanding this yet appointments may be valid depending on the facts of the case.

We therefore request the Hon'ble Chief Justice to constitute a larger Bench to look into the correctness of this judgment.

Pending application stands disposed of.”

23. In view of the above, the present petition is allowed and Justice BS Chauhan, a former judge of the Supreme Court of India, is appointed as the Sole Arbitrator to adjudicate the disputes that have arisen between the parties in respect of the Contract. This is subject to the Arbitrator making a necessary disclosure under Section 12(1) of the A&C Act and not being ineligible under Section 12(5) of the A&C Act.

24. The parties are at liberty to approach the Arbitral Tribunal for further proceedings.

VIBHU BAKHRU, J

JANUARY 27, 2021
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