

# Geeta Poddar vs Satya Developers Private Limited on 4 February, 2021

**Author: Rajiv Shakdher**

**Bench: Rajiv Shakdher**

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\* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ Rev.P.No.377/2019, I.A.Nos.12591/2019 & 12593/2019 in  
ARB.P. 133/2019

GEETA PODDAR

Through : Mr. Rajiv Dalal and Mr.  
Kumar Sharma, Advs.

versus

SATYA DEVELOPERS PRIVATE LIMITED

.....Respond

Through : Ms. Kaadambari, Adv.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

ORDER

% 04.02.2021 [Court hearing convened via video-conferencing on account of COVID-19]  
Rev.P.No.377/2019, I.A.Nos.12591/2019 & 12593/2019

1. With the consent of learned counsels for the parties, the matter is taken up for hearing.
2. The record would show that on 25.02.2019, I had dismissed the petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 (in short '1996 Act').
3. The relevant observations made, while dismissing the Section 11 petition, are set forth hereafter:

"... 3. Briefly, learned counsel for the petitioner argues that the incumbent Arbitrator cannot continue with the proceedings. 3.1 In this behalf, reliance is placed by the learned counsel on the arbitration agreement which is incorporated in Clause 20 of the Buyers Agreement dated 6.9.2014.

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3.2 Clause 20 reads as follows:  
"20. ARBITRATION

20.1 It is agreed between the parties that any dispute which may be in relation to this present Agreement would not be taken up by the parties against each other in any criminal complaint either to the police or any Court.

Both parties specifically waive their rights to do so against each other. The Buyer also waives his right to file Consumer Complaint on any issue which may be connected or arise out of this Agreement. Parties agree to resolve their entire disputes through the Dispute Resolution Mechanism agreed herein below.

20.2 That in case of any dispute or controversy arising out of or in connection with this Agreement the same shall be referred to the Arbitration of a sole Arbitrator to be appointed by the Managing Director of the Developer. The arbitration proceedings shall be held in accordance with the Arbitration & Conciliation Act, 1996, and the Rules made there under as amended from time to time. The place of arbitration shall be New Delhi only and the language of the arbitration proceedings shall be English. The cost of arbitration including the arbitrator's fee shall be shared jointly by the Developer and the Buyer. The parties agree that during the pendency of the Arbitration, the parties shall continue to discharge their respective obligations under this Agreement.

20.3 The rights and obligations' of the parties under or arising out of this Agreement shall be construed and enforced in accordance with laws of India."

4. In support of this submission, the learned counsel seeks to place reliance on the judgment of the Supreme Court rendered in TRF Limited vs. Energo Engineering Projects Limited (2017) 8 SCC 377.

4.1 In particular, the learned counsel for the petitioner seeks to rely upon the observations made by the Supreme Court in paragraph 54.

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5. I must indicate herein that prior to the incumbent Arbitrator another Arbitrator was appointed whose appointment was challenged on similar grounds.

6. The learned counsel for the petitioner in the arbitration proceedings dated 13.1.2018 had raised this very objection.

7. It is, however, not disputed by the counsel for the petitioner that after that several hearings were held and thereafter, the learned Arbitrator withdrew from the proceedings.

8. I am told by the counsel for the petitioner that the Arbitrator withdrew from the proceedings as lack of trust was expressed by the petitioner.

8.1 It is, in these circumstances, that the incumbent Arbitrator came to be appointed.

9. To my mind, in order to appreciate the ratio of the judgment of the TRF Limited, one would have to advert to the arbitration agreement which obtained between the parties in that case. 9.1 Para 8 of the judgment refers to Clause 33 which incorporated the arbitration agreement.

9.2 For the sake of convenience, the same is extracted herein.

"33. Resolution of dispute/arbitration a. In case any disagreement or dispute arises between the buyer and the seller under or in connection with the PO, both shall make every effort to resolve it amicably by direct informal negotiation.

b. If, even after 30 days from the commencement of such informal negotiation, seller and the buyer have not been able to resolve the dispute amicably, either party may require that the dispute be referred for resolution to the formal mechanism of arbitration.

c. All disputes which cannot be settled by mutual negotiation shall be referred to and determined by arbitration as per the Arbitration and Conciliation, 1996 as amended.

d. Unless otherwise provided, any dispute or difference between the parties in connection with this agreement shall ARB.P. 133/2019 page 3 of 8 be referred to sole arbitration of the Managing Director of Buyer or his nominee. Venue of arbitration shall be Delhi, and the arbitration shall be conducted in English language. e. The award of the tribunal shall be final and binding on both; buyer and seller."

10. A close perusal of Clause 33 would show that in the TRF Limited case the reference of disputes was to be made to the Managing Director of one of the parties i.e. the buyer or his nominee.

11. In the instant case, the Managing Director of the respondent is not the Arbitrator.

12. Under Clause 20 of the subject Buyers Agreement, the Managing Director has been given the authority to appoint an Arbitrator.

13. In my view, this presents a materially different circumstance in contradistinction to what obtained in TRF Limited case.

14. Therefore, the ratio of the judgment in TRF Limited case has to be understood in the light of Clause 33 which captured the arbitration agreement obtaining between parties in that case.

15. Thus, the observations made in paragraph 54, to my mind, would not come to the aid of the petitioner."

4. The petitioner, being aggrieved, preferred a special leave petition i.e. SLP No. 7125/2019. The Supreme Court, vide order dated 29.03.2019, disposed of the said special leave petition. The order passed by the Supreme Court reads as follows:

"Learned counsel for the petitioner seeks permission to withdraw this petition with liberty to file review petition before the High Court.

Permission sought for is granted.

The special leave petition is dismissed as withdrawn with the above liberty.

ARB.P. 133/2019 page 4 of 8 In case the petitioner fails before the High Court, liberty is granted to the petitioner to move this Court once over again challenging the main order as well as the order passed in review petition."

5. It is thereafter, that the petitioner filed, I am told, the captioned review petition only on 30.05.2019.

5.1 To be noted, the review petition came up for consideration before the court only on 12.09.2019. On that date, the matter was stood over till 27.09.2019.

5.2 On account of paucity of time, the matter could not be taken up on 27.09.2019. The review petition, along with the applications, came up for hearing, thereafter, on 24.01.2020 when, I had noticed that during the pendency of the review petition, the Supreme Court had rendered a judgement in the case of Perkins Eastman Architects DPC & Anr. vs. HSCC (India) Ltd., 2019 SCC Online SC 1517.

5.3 In that background, I had indicated that the matter required consideration and, accordingly, notice was issued to the respondents in the review petition as well as in the application seeking condonation of delay in filing as also in re-filing the review petition. The matter was, thus, directed to be listed on 20.03.2020.

5.4 Because of the lockdown imposed, due to the onset of Coronavirus, the matter could be taken up only on 09.12.2020. On that date, I was informed by Mr. Rajiv Dalal, who appears on behalf of the petitioner, that, in the meanwhile, the arbitrator had passed an award concerning the disputes obtaining between the parties on 22.01.2020.

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5.5 In view of this, I had queried Mr. Dalal that since the award already been passed, whether, in the present proceedings, the award could be set aside.

5.6 Mr. Dalal had sought time to persuade me that the award could be set aside even in the present proceedings.

6. It is in this context that the matter was listed for further hearing on 27.01.2021.

6.1 On that date, Ms. Kaadambari entered appearance on behalf of the respondent. Ms. Kaadambari sought time to file replies to the captioned review petition as well as the applications.

7. Today, the matter has been heard at some length. In my view, in view of the judgement of the Supreme Court, rendered in Perkins Eastman Architects DPC case, there is a case made out for recall of the order dated 25.02.2019. The reason I say so is because of the observations made in paragraphs 19 to 21 of the said judgement. For the sake of convenience, the same are extracted hereafter:

"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.

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20. We thus have two categories of cases. The first, similar to the one dealt with in TRF Limited<sup>4</sup> 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<sup>4</sup>, 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<sup>4</sup>. 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."

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8. That being said, what requires to be considered further is: whether the award dated 22.01.2020, can be set aside, in a petition filed under Section 11 of the 1996 Act?

8.1 This is an aspect which the roster bench would have to examine. I must indicate that Mr. Dalal, in support of his submission, has cited the judgement of Supreme Court in Bharat Broadband Network Ltd. vs. United Telecoms Ltd., (2019) 5 SCC 755.

8.2 It is important to note that this judgement was rendered in the context of Sections 14 and 15 of the 1996 Act whereas the instant petition, as indicated above, has been filed under Section 11 of the said act.

9. Given the foregoing, the applications for condonation of delay in filing and re-filing are allowed.

10. Furthermore, the review petition is also allowed and the order dated 25.02.2019 is recalled.

11. Accordingly, the matter is now directed to be placed before the roster bench, on 19.02.2021, for de novo arguments in the petition preferred under Section 11 of the 1996 Act.

12. Needless to add, the parties will be at liberty to advance their respective submissions in the matter before the roster bench without being burdened with the observations made hereinabove.

RAJIV SHA

FEBRUARY 4, 2021

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