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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on 29th January , 2021

+ ARB.P. 86/2021 and IA 851/2021 (Section 151 CPC)

C S ELECTRIC LTD Petitioner
Through Mr. Rahul Malhotra, Adv.

versus

JOP POWER Respondent
Through Mr. Raman Kapur, Sr.
Advocate with Mr. Varun
Kapur, Adv.

**CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR**

J U D G M E N T (O R A L)

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29.01.2021

(Video-Conferencing)

1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “1996 Act”), to refer the dispute, between the petitioner and the respondent, to arbitration.

2. Given the nature of the controversy, a brief recital of facts would suffice. On 3rd December, 2011, an Agreement was executed between the petitioner and the respondent, whereunder the petitioner was required to supply Sandwich Bus Ducts to the respondent.

3. Article 15.3.1 of the Agreement dated 3rd December, 2011, provided for resolution of the disputes by arbitrator, which read thus:

“15.3.1 All disputes shall be resolved through Arbitration. The appointment of a sole arbitrator to be selected by the Supplier/ Manufacturer out of the names 3 such notable persons to be given by "JOP" within a period of 30 days from the notice of reference of unresolved disputes between the parties. The jurisdiction of holding the proceedings of such arbitration shall be the state of Delhi. The applicable law will be Arbitration and Conciliation Act, 1996. In case the Supplier/ Manufacturer fails to choose the name of an Arbitrator from the 3 names of Arbitrators suggested by “JOP” BOARD reserves its right to appoint an Arbitrator of its choice and the Supplier/Manufacturer shall be bound by such Arbitrator and his award.”

4. Disputes arose between the parties. *Vide* letter dated 14th June, 2014, the respondent appointed one Mr. K. Sunil as the arbitrator to arbitrate on the disputes.

5. Contending that the learned arbitrator was not exercising its function with due diligence and he was unduly delaying the proceedings, the petitioner filed OMP(T)(COMM) 1/2018 before the learned Additional District Judge (hereinafter referred to as “learned ADJ”), under Sections 14(1) and 14(2) of the 1996 Act, for termination of the mandate of Mr. K. Sunil. *Vide* order, dated 29th September, 2020, OMP(T)(COMM) 1/2018 was allowed by the learned ADJ and mandate of Mr. K. Sunil, to arbitrate on the disputes between the petitioner and the respondent, was terminated, in terms of Section 14 of the 1996 Act. This order has, admittedly, attained finality.

6. Pursuant to the termination of the mandate of Mr. Sunil, it became necessary to appoint a substitute arbitrator to arbitrate on the

disputes between the petitioner and the respondent.

7. The respondent, acting in accordance with the afore-extracted Clause 15.3.1 of the Agreement, proposed, *vide* letter dated 26th November, 2020 addressed to the petitioner, the names of three persons, out of which, the petitioner was requested to suggest one to appoint its arbitrator to arbitrate on the aforesaid disputes. The petitioner responded only on 4th January, 2021, after the period of 30 days, stipulated in Clause 15.3.1 of the Agreement, had expired, suggesting the name of Mr. O.P. Bhatia, one of three names, proposed by the respondent, to act as an arbitrator to arbitrate on the disputes between the parties.

8. On the same day, the respondent wrote to the petitioner stating that it had already appointed Mr. G.K. Pharlina, also one of the three names, proposed by the respondent in its communication dated 26th November, 2020, to arbitrate on the disputes.

9. Apparently, thereafter, Mr. Pharlina accepted his nomination as arbitrator and fixed hearing in the matter.

10. The petitioner, however, *vide* email dated 9th January, 2021, opposed the appointment of Mr. Pharlina as the arbitrator, stating that it had already appointed Mr. Bhatia as arbitrator *vide* its communication dated 4th January, 2021.

11. It is in these circumstances that the petitioner has moved the

present petition, requesting this Court to appoint an independent arbitrator, in exercise of its powers conferred by Section 11 of the 1996 Act.

12. Mr. Rahul Malhotra, learned counsel for the petitioner, first sought to argue that though the petitioner had not responded to the communication dated 26th November, 2020, of the respondent, by selecting an arbitrator out of the three names, proposed in the said communication within the period of 30 days stipulated in Clause 15.3.1 of the Agreement, the appointment, by the petitioner, of Mr. Bhatia as the arbitrator, as communicated to the respondent on 4th January, 2021, ought to be treated as valid. For this purpose, Mr. Malhotra submitted that the period of 30 days stipulated in Clause 15.3.1 of the Agreement should only be regarded as directory and not mandatory. He, however, acknowledged candidly, on the last date of hearing that he could not lay hands on any judicial authority, to support this submission.

13. In my view, the submission is not, *ex facie*, acceptable. The Supreme Court has, in *U.O.I. v. PREMCO-DKSPL (JV)*¹ specifically held that the covenants of the arbitration agreement are sacrosanct and have to be strictly enforced. The period of 30 days stipulated in Clause 15.3.1, therefore, unquestionably bound the parties and on the expiry of 30 days from the communication dated 26th November, 2020, addressed by the respondent to the petitioner, the petitioner's right to select an arbitrator out of the panel proposed by the

¹ (2016) 14 SCC 651
ARB.P. 86/2021

respondent, stood extinguished.

14. The appointment of Mr. Bhatia, as suggested by the petitioner, on 4th January, 2021, cannot, therefore, pass muster, as it was effected beyond the period of 30 days as stipulated in Clause 15.3.1 of the Agreement, and was, therefore, in violation of the terms of the Agreement between the parties.

15. Accordingly, the prayer of the petitioner, for approval of the appointment of Mr. Bhatia as the arbitrator to arbitrate on the disputes, is rejected.

16. Equally, however, I am of the opinion that the appointment of Mr. Pharlia as the sole arbitrator, as effected by the respondent, also cannot pass legal muster. Mr. Raman Kapur, learned Senior Counsel appearing for the respondent, acknowledges that the appointment of Mr. Pharlia by the respondent, was in exercise of the residuary authority conferred, by Clause 15.3.1, on the respondent, to select an arbitrator out of the panel suggested by the respondent to the petitioner, consequent on default, by the petitioner, to select the arbitrator within 30 days of communication of the names by the respondent.

17. There is no gainsaying the fact that Clause 15.3.1 of the Agreement does authorize the respondent, in the event of the petitioner failing to select an arbitrator out of the panel proposed by the respondent within 30 days of communication of such proposal, to

itself select one of the names from the panel as the arbitrator to arbitrate on the disputes.

18. In my view, however, this residuary power, as conferred by Clause 15.3.1 (*supra*) is in the teeth of the law laid down by the Supreme Court in *Perkins Eastman Architects DPC v. HSCC (India) Ltd*² and *TRF Limited v. Energo Engineering Projects Ltd*³ read with Section 12(5) and Schedule VII to the 1996 Act. The Supreme Court has, in these decisions, clearly discountenanced conferment of any authority, on either of the parties to the Agreement, either to act as arbitrator or to appoint the arbitrator to arbitrate on the disputes.

19. As such, the stipulation, in Clause 15.3.1 of the Agreement that in the event of failure, on the part of the supplier/manufacturer, i.e. the petitioner to select a name out the panel, suggested by the respondent-JOP, within 30 days of the such suggestion, the JOP could appoint an arbitrator of its choice out of the said panel, cannot, in my view, be sustained or be permitted to be enforced. This part of Clause 15.3.1 is, according to me, clearly severable from the earlier part of the said clause and being contrary to the law laid down in *Perkins Eastman*² (*supra*), could not have been invoked, or enforced, by the respondent.

20. Mr. Kapur has sought to place reliance on the judgment of the Supreme Court in *Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV)*⁴, to submit that the aforesaid residuary

² 2019 SCC Online SC 1517

³ (2017) 8 SCC 377

⁴ 2019 SCC OnLine SC 1635

clause was not invalid. Having gone through the decision in *Central Organisation for Railway Electrification*⁴, I am unable to find anything, in the said decision, which would validate such a residuary conferment of authority, as contained in Clause 15.3.1 in the agreement between the petitioner and the respondent. The arbitration clause in *Central Organisation for Railway Electrification*⁴ provided for the proposal of a panel of the names by Central Organisation for Railway Electrification (hereinafter referred to as “CORE”), to the respondent before the Supreme Court, out of which the respondent was authorised to select any two. Once the respondent had selected two names out of the panel of four proposed by CORE, the Managing Director of CORE was authorised to pick one of the said two names as the contractor nominee to arbitrate on the disputes. There was no conferment of any residuary authority, on CORE, in the event of default by the respondent to suggest the names out of the panel of four, *to itself select an arbitrator of its own choice out of the said panel to arbitrate on the disputes.* The situation that arises in the present case, therefore, was not before the Supreme Court in *Central Organisation for Railway Electrification*⁴ and, therefore, the said decision cannot be of any assistance to the respondent.

21. In view thereof, I am of the opinion that respondent could not, in the face of law laid down in *Perkins Eastman*² and *TRF*³, have chosen an arbitrator out its choice, even out of the panel of three proposed by the respondent to the petitioner, to arbitrate on the disputes, on the petitioner failing to exercise such choice within 30 days of suggestion of names by the respondent. The respondent could,

in such circumstances, have approached this Court, but did not choose to do so.

22. Resultantly, the appointment of Mr. Pharia as arbitrator to arbitrate on the disputes between the parties must also be treated as without authority of law.

23. The task of appointing arbitrator to arbitrate on the disputes between the parties, therefore, devolves on this Court.

24. In view thereof, this Court appoints Mr. Vijay Motwani, retired ADG (CPWD), as arbitrator to arbitrate on the disputes between the parties.

25. The contact details of the learned arbitrator are as under:

CII/153, Satya Marg,
Chanakyapuri,
New Delhi-110 021

Phone No.9811793440
Email ID: motwanivijayg@gmail.com

26. The parties are directed to contact the learned arbitrator within one week of communication of email by the Registry of this Court the copy of this order.

27. The fees of the learned arbitrator shall be fixed by the learned arbitrator in consultation with the parties.

28. The learned arbitrator shall furnish the requisite disclosure under Section 12(2) of the 1996 Act within a week of entering on reference.

29. Subject to the aforesaid directions, this petition stands disposed of.

IA 851/2021 (Section 151 CPC)

In view of the order passed in the petition, this application stands disposed of.

C. HARI SHANKAR, J.
JANUARY 29, 2021/r.bararias

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