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THE SUPREME COURT HOLDS THAT A PERSON WHO HAS AN INTEREST IN THE OUTCOME OF THE DISPUTE TO NOT HAVE THE POWER TO APPOINT A SOLE ARBITRATOR

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A Division Bench of the Hon'ble Supreme Court of India, comprising Justice Uday Umesh Lalit and Justice Indu Malhotra has, *vide* judgment dated 26 November 2019 passed in the matter of *Perkins Eastman Architects DPC & Another v HSCC (India) Limited*, while dealing with Section 11 (6) read with Section 11 (12)(a) of the Arbitration and Conciliation Act, 1996 (Act) has held that a person who has an interest in the outcome or decision of the disputes must not have the power to appoint a sole arbitrator.

FACTUAL BACKGROUND

- In response to a Request for Proposal, the consortium of the Applicants, namely, (i) Perkins Eastman Architects DPC, an Architectural firm having its registered office in New York and (ii) Edifice Consultants Private Limited, having its office in Mumbai submitted their bids to the Respondent i.e. HSCC (India) Limited and were declared successful bidders. Thereafter, *vide* letter of intent, the project was awarded to the Applicants. A letter of award was issued in favour of the Applicants and a contract was entered between the Applicants and the Respondent. Pertinently, Clause 24 of the contract provided that the Chairman and Managing Director of the Respondent Company shall appoint a sole arbitrator to adjudicate the disputes between the parties.
- Within 6 (six) days of the signing of the said contract, the Respondent alleged failure on part of the Applicants which was followed by stop work notice. Later, a termination notice was issued by the Respondent alleging non-compliance of contractual obligations on part of the Applicants, which was denied by the Applicants. However, the termination letter was issued much later. Thereafter, a notice was issued by the Advocate for the Applicants invoking the dispute resolution clause. In terms of Clause 24 of the contract, a decision in respect of the said notice was required to be taken within one month, but a communication was issued by the Respondent after a period of 30 (thirty) days intimating that a reply to the notice would be sent within 30 (thirty) days.
- An appeal was filed by the Applicants before the Director (Engineering) in terms of said Clause 24 but there was complete failure on part of the Director (Engineering) to discharge the obligations in terms of said Clause 24. Therefore, by a letter addressed by the Applicants, the Chief Managing Director of the Respondent was called upon to appoint a sole arbitrator in terms of said Clause 24. However, no appointment of an arbitrator was made within the stipulated period of 30 (thirty) days, but a letter issued more than a month later by the

Chief General Manager of the Respondent, purportedly appointed one Major General K.T. Gajria as the sole arbitrator.

- Aggrieved by the aforesaid non-compliance of Clause 24 of the contract, the Applicant filed an application under Section 11(6) read with Section 11(12)(a) of the Act before the Hon'ble Supreme Court of India seeking the appointment of a sole arbitrator in accordance with terms of the contract between the parties.

ISSUES FOR CONSIDERATION BEFORE THE SUPREME COURT

- Whether the arbitration in the present case would be "International Commercial Arbitration"?
- Whether a case had been made out for the exercise of power by the Court to appoint an arbitrator?

MAIN ARGUMENTS RAISED ON BEHALF OF THE APPLICANTS

As per the contract, the Chairman and the Managing Director were the competent authorities to appoint a sole arbitrator. However, a failure on the part of the Respondent in appointing an arbitrator within the stipulated period entitled the Applicants to seek such appointment under Section 11 of the Act. The Chairman and Managing Director of the Respondent would naturally be interested in the outcome or decision in respect of the dispute, and therefore the prerequisite element of impartiality would conspicuously be absent in the adjudication process. The decision of the Hon'ble Supreme Court in the case of *TRF Limited v Energo Engineering Projects Limited* [(2017) 8 SCC 377] was relied on. Further, the matter was an International Commercial Arbitration since as per the Consortium Agreement entered between the Applicants, Applicant No. 1 was described as the lead member of the Consortium.

MAIN ARGUMENTS RAISED ON BEHALF OF THE RESPONDENTS

The period of requisition expired on a Friday and the arbitrator was appointed at the first available working day thereafter. The arbitrator was appointed by the Chairman and the Managing Director of the Respondent but was only conveyed by the Chief General Manager and as such, infirmities were completely non-existent. Further, the instant matter was not an International Commercial Arbitration as under Clause 9 of the Consortium Agreement both the Applicants were jointly and severally responsible for the execution of the project.

JUDGMENT

The Supreme Court, while allowing the Appeal, has held as follows:

- On the issue of arbitration being an International Commercial Arbitration, it was held that since the lead member of the Consortium Agreement was Applicant No. 1 having its registered office in New York, the requirements of Section 2(1)(f) are satisfied and the arbitration in the present case would therefore be an "International Commercial Arbitration". The Hon'ble Supreme Court also noted that it could not have dealt with the application under Section 11 (6) read with Section 11(12)(a) of the Act if the arbitration was not an International Commercial Arbitration.
- Further, heavily relying upon the judgment in *TRF Limited* (supra), the Hon'ble Court observed that 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. Further, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole

arbitrator and that must 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* (supra).

- The Supreme Court referred to the observations made in *Indian Oil Corporation Limited v Raja Transport (P) Limited* [12 (2009) 8 SCC 520], wherein it was held that if there are justifiable doubts as to the independence and impartiality of the person nominated as an arbitrator, and if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, such appointment can be made by the competent Court in order to necessitate the importance of impartial and independent arbitrators.
- Further, on the issue of appointment of the arbitrator by the Hon'ble Supreme Court, keeping in mind the imperatives of fit arbitration environment, it was held that unless the appointment of the arbitrator is *ex facie* valid and such appointment satisfies the Court exercising jurisdiction under Section 11(6) of the Act, acceptance of such appointment as a *fait accompli* to debar the jurisdiction under Section 11(6) cannot be accepted.
- Applying the above principles to the facts of the present matter, the Hon'ble Supreme Court annulled the effect of the letter issued by the Respondent appointing the sole arbitrator and appointed an arbitrator to adjudicate the disputes between the parties. The Supreme Court further, held that the appointment of the arbitrator would be subject to mandatory declaration under the amended Section 12 of the Act with respect to independence and impartiality and the ability to devote sufficient time to complete the arbitration within the period as per Section 29A of the Act.

COMMENT

The judgment delivered by the Hon'ble Supreme Court reiterates the imperatives of creating a healthy arbitration environment and is in line with the amendments to the Act. The Hon'ble Supreme Court has clarified that in order to attain a complete impartial arbitral domain a person deriving any interest in the arbitral proceedings has no authority to appoint a sole arbitrator. The said parameter has been strictly laid down in order to avoid partiality and doubts as to the independence of the person appointed as the arbitrator and aims to make India more conducive for arbitrations. Further, by this decision, the Hon'ble Supreme Court has established that the court of competent jurisdiction has the right to annul the arbitrator appointed in order to grant justifiable and impartial reliefs to the parties.

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