

*Before G. S. Sandhawalia, J.*

**BHARAT PETROLEUM CORPORATION LIMITED** —*Petitioner*

*versus*

**M/S UTTAR HARYANA BIJLI VITARAN NIGAM AND  
OTHERS**—*Respondents*

**CWP No.5196 of 2021**

September 29, 2021

*Constitution of India, 1950 – Arts. 226 and 227 – Writ petition – Arbitration and Conciliation Act, 1996 – Ss.13 (3), 14 and 16 – Jurisdiction of arbitrator – Objection to – When to be adjudicated – On facts, the arbitration clause stipulated the disputes between parties were to be referred to the sole arbitrator/Managing Director of the respondent – He appointed a retired District and Sessions Judge as the arbitrator – Challenge to this appointment as the MD, who himself was ineligible to act as an arbitrator, could not nominate any other person – The arbitrator, instead of deciding the petitioner’s application challenging his appointment under S.13 (3), ordered it would be taken up at the time of writing the final award – Held, once the question of jurisdiction arose, it went to the root of the matter; skirting the issue was not correct methodology adopted by the arbitrator – As held by the Hon’ble Supreme Court in Perkin Eastman Architects DPC case, once the MD himself becomes ineligible to act as an arbitrator he cannot nominate any other person as an arbitrator – Impugned orders were, therefore, set-aside – Further, it was deemed appropriate to appoint an independent arbitrator instead of driving the parties to another round of litigation to file application under S.11 of the Act – Petition disposed of by appointing a retired judge as an arbitrator.*

*Held that, once the question of jurisdiction arose, it goes to root of the matter and this Court is of the opinion that skirting the said issue and thereafter holding that the matter would be gone into at the final stage was not a correct methodology adopted by the arbitrator. It is not disputed that the judgment passed in TRF Limited (supra) has further been followed in 'Perkins Eastman Architects DPC and another Vs. HSCC (India) Ltd.', 2021 AIR (SC) 59.*

(Para 9)

*Further held that*, in the said case, the arbitrator had been duly appointed by the Managing Director of the respondent-company and the same was subject matter of challenge on this issue that the Managing Director and also its nominee as such could not go into the dispute. While relying upon the judgment passed in TRF Limited (supra), it was held that the Managing Director became ineligible by operation of law to act as an arbitrator and he could not nominate any other person to act as an arbitrator. The Apex Court had thereafter annulled the effect of the letter dated 30.07.2019 and appointed an independent arbitrator to decide the dispute.

(Para 10)

*Further held that*, keeping in view the above, this Court is of the opinion that the order dated 18.08.2020 (Annexure P-17) asking the respondent No.4 to enter into reference and regarding the order of jurisdiction vide order dated 16.12.2020 (Annexure P-20) cannot be sustained. Accordingly, the same are set aside.

(Para 11)

*Further held that*, keeping in view the above facts, it would be appropriate to appoint a independent arbitrator rather than driving the parties to another round of litigation to file an application under Section 11 of the Act. Accordingly, Justice R.P. Nagrath (retd.) resident of #162, Sector-123, New Sunny Enclave, Kharar, Mohali, Mobile No.8558809901 is appointed as an Arbitrator. He shall file the requisite declaration under Section 12 of the Act read with the fifth and sixth schedule in order to disclose his independence and impartiality to settle the dispute between the parties. The Arbitrator is also requested to complete the proceedings within the time specified under Section 29A of the Act. The fees of the Arbitrator shall be paid in accordance with the provisions of the Act and the Rules.

(Para 12)

Ashish Kapoor, Advocate , *for the petitioner.*

Baldev Raj Mahajan, Senior Advocate with Nikita Goel,  
Advocate, for the respondents.

**G.S. SANDHAWALIA, J. (ORAL)**

(1) Challenge in the present writ petition is to the appointment of the Arbitrator-Tribunal vide letter dated 18.08.2020 (Annexure P-17) by respondent No.1 regarding purchase order dated 06.09.2018

(Annexure P-2), whereby the Arbitrator was asked to enter upon the reference in terms of Arbitration & Conciliation Act, 1996 (for short 'the Act') on account of a dispute having arisen between the petitioner and respondent No.1.

(2) Challenge has also been raised to the subsequent order passed by the Arbitrator-Tribunal on 16.12.2020 (Annexure P-20), wherein the application filed under Sections 13, 14 and 16 of the Act was dismissed by holding that the parties have raised disputed questions of law and facts. It was further held that without expressing any opinion on the merits of the case directions be issued for filing reply and after taking evidence of both the parties the points raised by the respondents and the application would be taken due care at the time of writing the final award. Resultantly, the matter was fixed for further proceedings on 18.01.2021.

(3) Counsel for the petitioner has restricted his arguments to one legal issue as to the factum that a specific question was raised before the Arbitrator under Section 13 that the Arbitrator-Tribunal was to decide on the fact under Section 13 (3) and, therefore, keeping the matter pending was not justified. It is submitted that the appointment by a Managing Director of respondent No.1 as such was questioned as the arbitrator was stated to be a nominee under the said arbitration clause 23. It is, thus, submitted that once the jurisdiction of the Tribunal as such was questioned, it had to be done under Section 16 (2) which says not later than the submission of the statement of defence and the Tribunal was to decide on the said plea and by postponing such decision the action was not justified.

(4) The purchase order in question dated 06.09.2018 (Annexure P-2) which is stated not to have been finalized also as per the petitioner, provides an arbitration clause, which reads as under:-

#### **“14 ARBITRATION**

All matter question, disputes, differences and/or claims arising out of and/or concerning and/or in connection and/or in consequences or relating to the Contract whether or not obligations of either or both parties under the contract be subsisting at the time of dispute and whether or not the contract has been terminated or purported to be terminated or completed, shall be referred to the Sole Arbitration of the MD, UHBVN or an officer appointed by the MD, UHBVN as his nominee. The award of the arbitration shall be final

and binding upon the parties to this contract.

The objection that the Arbitrator has to deal with the matters to which the Contract relates in the course of his duties or he has expressed his views on any or all of the matters in dispute of difference, shall not be considered as a valid-objection.

The Arbitrator may from time to time with the consent of parties to the Contract enlarge the time for making the Award. The venue of arbitration shall be the place from the acceptance of offer is issued or such other place as the Arbitrator in his discretion may determine.

The parties too the contract agree that cost of arbitration shall be as per the instructions of the Nigam issued/prevalent on the date of appointment of arbitrate tribunal.

Subject to aforementioned provisions, the provisions of the Arbitration and Conciliation Act, 1996 and the Rules there under any statutory modifications thereof for the time being in force, shall be deemed to apply to the Arbitration proceedings under the clause.”

(5) Reading of the same would go on to show that all matter, questions and disputes relating to the contract between the parties have to be referred to the sole arbitrator of the MD of the respondent or an officer appointed by him.

(6) It is not disputed that the arbitrator who is a former District & Sessions Judge himself vide letter dated 02.09.2020 (Annexure P-18) addressed to both the parties stated that he was appointed as an arbitrator by the competent authority and, therefore, had entered into reference and asked the parties to put in appearance on 18.09.2020.

(7) A perusal of the letter dated 18.08.2020 (Annexure P-17) addressed by the legal officer for the respondent-Nigam would go on to show that the request had been made by the respondent-Nigam on the basis of which notice had been issued.

(8) Thus, it is apparent that by acting in terms of the arbitration clause, the Managing Director had appointed the Arbitrator. The objections as such before the Tribunal-Arbitrator was that in view of

the judgment of the Apex Court in *TRF Limited versus Energo Engineering Projects Limited*<sup>1</sup> his appointment was wrong. The learned Arbitrator has distinguished the said judgment which is a judgment by a Three Judges Bench of the Apex Court and relied upon the observations of the Delhi High Court in *Bhayana Builders versus Oriental Structural Engineering*<sup>2</sup> and tried to distinguish the judgment which is binding precedent of the Apex Court.

(9) Once the question of jurisdiction arose, it goes to root of the matter and this Court is of the opinion that skirting the said issue and thereafter holding that the matter would be gone into at the final stage was not a correct methodology adopted by the arbitrator. It is not disputed that the judgment passed in *TRF Limited (supra)* has further been followed in *Perkins Eastman Architects DPC and another versus HSCC (India) Ltd*<sup>3</sup>.

(10) In the said case, the arbitrator had been duly appointed by the Managing Director of the respondent-company and the same was subject matter of challenge on this issue that the Managing Director and also its nominee as such could not go into the dispute. While relying upon the judgment passed in *TRF Limited (supra)*, it was held that the Managing Director became ineligible by operation of law to act as an arbitrator and he could not nominate any other person to act as an arbitrator. The Apex Court had thereafter annulled the effect of the letter dated 30.07.2019 and appointed an independent arbitrator to decide the dispute. Relevant portion of the said judgment reads as under:-

“15. 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 act as an arbitrator. The Managing Director thus had two capacities under said Clause, the first as an arbitrator and the

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<sup>1</sup> 2017 (8) SCC 377

<sup>2</sup> (2018) 249 DLT 619

<sup>3</sup> 2021 AIR (SC) 59

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.

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.

16. 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.”

(11) Keeping in view the above, this Court is of the opinion that the order dated 18.08.2020 (Annexure P-17) asking the respondent No.4 to enter into reference and regarding the order of jurisdiction vide order dated 16.12.2020 (Annexure P-20) cannot be sustained. Accordingly, the same are set aside.

(12) Keeping in view the above facts, it would be appropriate to appoint a independent arbitrator rather than driving the parties to another round of litigation to file an application under Section 11 of the Act. Accordingly, Justice R.P. Nagrath (ret.d.) resident of #162, Sector-123, New Sunny Enclave, Kharar, Mohali, Mobile No.8558809901 is appointed as an Arbitrator. He shall file the requisite declaration under Section 12 of the Act read with the fifth and sixth schedule in order to disclose his independence and impartiality to settle the dispute between the parties. The Arbitrator is also requested to complete the proceedings within the time specified under Section 29A of the Act. The fees of the Arbitrator shall be paid in accordance with the provisions of the Act and the Rules.

(13) Copy of the order be forwarded to the said Arbitrator at the given address and to counsel for the parties also. After seeking the consent of the Arbitrator, the parties are directed to appear before the Arbitrator on 11.10.2021 at 10.00 a.m.

(14) The writ petition stands disposed of, in the abovesaid terms.