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2025:UHC:242

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

SRI JUSTICE G. NARENDAR, C.J.

7TH JANUARY, 2025

ARBITRATION PETITION NO. 78 OF 2023

Between:

M/s SPDD VDPPL JV and another. .....Applicants

and

State of Uttarakhand and others. ....Respondents

Counsel for the applicants	:	Mr. B.D. Pande and Mr. Rajesh Sharma, learned counsel.
Counsel for the respondents	:	Mr. B.S. Parihar, learned Standing Counsel with Ms. Rajni Supyal, learned Brief Holder for the State. Mr. Rohit Arora, learned counsel for respondent Nos. 2 to 4 virtually.

Upon hearing the learned Counsel, the Court made the following

JUDGMENT :

Heard learned counsel for the applicants and learned counsel for the respondents.

2. Brief facts are that the applicants were awarded a contract vide letter dated 31.12.2016 and the Agreement dated 23.02.2017 came to be executed between the parties for construction and renovation of Jummagad Small Hydro Project, Capacity 2 X 600 KW on turnkey basis and operation and maintenance for three months after commissioning in Block Joshimath, District Chamoli. The period of completion was fixed at 15 months from the date of the Agreement.

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3. It is the case of the applicants that the execution of the Project came to be delayed due to climatic and geological conditions and lackadaisical approach of the respondent-Department. Due to the reasons noted supra, the respondents are said to have terminated the contract apparently on account of the failure of the applicants to complete the execution within the agreed period. The termination of the contract is the cause for demand for arbitration. It is not in dispute that the Agreement, more particularly the general conditions of contract, envisages the resolution of disputes that may arise between the parties by resort to arbitration.

4. The short point that arises for consideration in the instant Application is whether the applicants are entitled for appointment of an Arbitrator de-hors the stipulation in Clause 28.0, wherein it has been agreed that the Principal Secretary/Secretary, Department of Energy, Government of Uttarakhand, Dehradun shall act as the sole arbitrator or any person nominated by him is entitled to act as the sole arbitrator?

5. Learned counsel for the applicants places reliance on the ruling rendered in **Perkins Eastman Architects DPC and another vs. HSCC (India) Limited** reported in **(2020) 20 SCC 760** to contend that in the light of the law declared by the Hon'ble Apex Court, the concept of named

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Arbitrator, who himself is a interested party, is no more sustainable. He takes the Court through Paragraphs 18 to 24, 27 and 28 to buttress his contention that Clause 28.0 cannot be put against him and that the same is no more binding in view of the law declared by the Hon'ble Apex Court. Paragraphs 18 to 24, 27 and 28 of the above judgment are extracted hereinbelow:-

> "*18. The issue was discussed and decided by this Court as under: (TRF Ltd. vs. Energo Engg. Projects Ltd., (2017) 8 SCC 377):*
> *50. First, we shall deal with Clause (d). There is no quarrel that by virtue of Section 12(5) of the Act, if any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as the arbitrator. There is no doubt and cannot be, for the language employed in the Seventh Schedule, the Managing Director of the Corporation has become ineligible by operation of law. It is the stand of the learned Senior Counsel for the appellant that once the Managing Director becomes ineligible, he also becomes ineligible to nominate. Refuting the said stand, it is canvassed by the learned Senior Counsel for the respondent that the ineligibility cannot extend to a nominee if he is not from the Corporation and more so when there is apposite and requisite disclosure. We think it appropriate to make it clear that in the case at hand we are neither concerned with the disclosure nor objectivity nor impartiality nor any such other circumstance. We are singularly concerned with the issue, whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator. At the cost of repetition, we may state that when there are two parties, one may nominate an arbitrator and the other may appoint another. That is altogether a different situation. If there is a clause requiring the parties to nominate their respective arbitrator, their authority to nominate cannot be questioned. What really in that circumstance can be called in question is the procedural compliance and the eligibility of their arbitrator depending upon the norms provided under the Act and the Schedules appended thereto. But, here is a case where the Managing Director is the "named sole arbitrator" and he has also been conferred with the power to nominate one who can be the arbitrator in his place. Thus, there is subtle distinction. In this regard, our attention has been drawn to*

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a two-Judge Bench decision in State of Orissa v. Commr. of Land Records & Settlement (1998) 7 SCC 162. In the said case, the question arose, can the Board of Revenue revise the order passed by its delegate. Dwelling upon the said proposition, the Court held: (SCC p. 173, para 25)

"25. We have to note that the Commissioner when he exercises power of the Board delegated to him under Section 33 of the Settlement Act, 1958, the order passed by him is to be treated as an order of the Board of Revenue and not as that of the Commissioner in his capacity as Commissioner. This position is clear from two rulings of this Court to which we shall presently refer. The first of the said rulings is the one decided by the Constitution Bench of this Court in Roop Chand v. State of Punjab AIR 1963 SC 1503. In that case, it was held by the majority that where the State Government had, under Section 41(1) of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948, delegated its appellate powers vested in it under Section 21(4) to an "officer", an order passed by such an officer was an order passed by the State Government itself and "not an order passed by any officer under this Act" within Section 42 and was not revisable by the State Government. It was pointed out that for the purpose of exercise of powers of revision by the State under Section 42 of that Act, the order sought to be revised must be an order passed by an officer in his own right and not as a delegate of the State. The State Government was, therefore, not entitled under Section 42 to call for the records of the case which was disposed of by an officer acting as its delegate." (emphasis in original)

51. Be it noted in the said case, reference was made to Behari Kunj Sahkari Awas Samiti v. State of U.P. (1997) 7 SCC 37, which followed the decision in Roop Chand v. State of Punjab AIR 1963 SC 1503. It is seemly to note here that the said principle has been followed in Indore Vikas Pradhikaran vs. Pure Industrial Coke and Chemicals Limited (2007) 8 SCC 705.

52. Mr Sundaram has strongly relied on Pratapchand Nopaji vs. Kotrike Venkata Setty & Sons (1975) 2 SCC 208. In the said case, the three-Judge Bench applied the maxim "qui facit per alium facit per se". We may profitably reproduce the passage: (SCC p. 214, para 9)

> *"9. … The principle which would apply, if the objects are struck by Section 23 of the Contract Act, is embodied in the maxim: "qui facit per alium facit per se" (what one does through another is done by oneself). To put it in another form, that which cannot be done directly may not be done indirectly by engaging another outside the prohibited area to do the illegal act within the prohibited area. It is immaterial whether, for the doing of such an illegal*

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act, the agent employed is given the wider powers or authority of the "pucca adatia", or, as the High Court had held, he is clothed with the powers of an ordinary commission agent only."

53. The aforesaid authorities have been commended to us to establish the proposition that if the nomination of an arbitrator by an ineligible arbitrator is allowed, it would tantamount to carrying on the proceeding of arbitration by himself. According to the learned counsel for the appellant, ineligibility strikes at the root of his power to arbitrate or get it arbitrated upon by a nominee.

54. In such a context, the fulcrum of the controversy would be, can an ineligible arbitrator, like the Managing Director, nominate an arbitrator, who may be otherwise eligible and a respectable person. As stated earlier, we are neither concerned with the objectivity nor the individual respectability. We are only concerned with the authority or the power of the Managing Director. By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act. It is inconceivable in law that person who is statutorily ineligible can nominate a person. Needless to say, once the infrastructure collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. Or to put it differently, once the identity of the Managing Director as the sole arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated. Therefore, the view expressed by the High Court is not sustainable and we say so."

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.

20. We thus have two categories of cases. The first, similar to the one dealt with in ***TRF Limited*** *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,*

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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****, 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****. 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 (3 of 2016) and recognised by the decision of this Court in TRF Limited.*

22. We must also at this stage refer to the following observations made by this Court in para 48 of its decision in Indian Oil Corpn. Ltd. v. Raja Transport (P) Ltd. (2009) 8 SCC 520, which were in the context that was obtaining before Act 3 of 2016 had come into force: -

> *"48. In the light of the above discussion, the scope of Section 11 of the Act containing the scheme of appointment of arbitrators may be summarised thus:*

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(i) Where the agreement provides for arbitration with three arbitrators (each party to appoint one arbitrator and the two appointed arbitrators to appoint a third arbitrator), in the event of a party failing to appoint an arbitrator within 30 days from the receipt of a request from the other party (or the two nominated arbitrators failing to agree on the third arbitrator within 30 days from the date of the appointment), the Chief Justice or his designate will exercise power under sub-section (4) of Section 11 of the Act.

(ii) Where the agreement provides for arbitration by a sole arbitrator and the parties have not agreed upon any appointment procedure, the Chief Justice or his designate will exercise power under sub-section (5) of Section 11, if the parties fail to agree on the arbitration within thirty days from the receipt of a request by a party from the other party.

(iii) Where the arbitration agreement specifies the appointment procedure, then irrespective of whether the arbitration is by a sole arbitrator or by a three- member Tribunal, the Chief Justice or his designate will exercise power under sub-section (6) of Section 11, if a party fails to act as required under the agreed procedure (or the parties or the two appointed arbitrators fail to reach an agreement expected of them under the agreed procedure or any person/institution fails to perform any function entrusted to him/it under that procedure).

(iv) While failure of the other party to act within 30 days will furnish a cause of action to the party seeking arbitration to approach the Chief Justice or his designate in cases falling under sub-sections (4) and (5), such a time-bound requirement is not found in sub-section (6) of Section 11. The failure to act as per the agreed procedure within the time-limit prescribed by the arbitration agreement, or in the absence of any prescribed time-limit, within a reasonable time, will enable the aggrieved party to file a petition under Section 11(6) of the Act.

(v) Where the appointment procedure has been agreed between the parties, but the cause of action for invoking the jurisdiction of the Chief Justice or his designate under clauses (a), (b) or (c) of sub-section (6) has not arisen, then the question of the Chief Justice or his designate exercising power under sub- section (6) does not arise. The condition precedent for approaching the Chief Justice or his designate for taking necessary measures under sub-section (6) is that

> *(i) a party failing to act as required under the agreed appointment procedure; or*
>
> *(ii) the parties (or the two appointed arbitrators) failing to reach an agreement expected of them under the agreed appointment procedure; or*

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(iii) a person/institution who has been entrusted with any function under the agreed appointment procedure, failing to perform such function.

(vi) The Chief Justice or his designate while exercising power under sub-section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause.

(vii) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else."

(emphasis in original)

23. Sub para (vii) of aforesaid paragraph 48 lays down that if there are justifiable doubts as to the independence and impartiality of the person nominated, and if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, such appointment can be made by the Court. It may also be noted that on the issue of necessity and desirability of impartial and independent arbitrators the matter was considered by the Law Commission in its report No.246. Paragraphs 53 to 60 under the heading "Neutrality of Arbitrators" are quoted in the Judgment of this Court in Voestapline Schienen Gmbh v. Delhi Metro Rail Corpn. Ltd. (2017) 4 SCC 665, while paras 59 and 60 of the report stand extracted in the decision of this Court in Bharat Broadband Network Limited vs. United Telecoms Limited (2019) 5 SCC 755. For the present purposes, we may rely on paragraph 57, which is to the following effect:-

"57. …The balance between procedural fairness and binding nature of these contracts, appears to have been tilted in favour of the latter by the Supreme Court, and the Commission believes the present position of law is far from satisfactory. Since the principles of impartiality and independence cannot be discarded at any stage of the proceedings, specifically at the stage of constitution of the Arbitral Tribunal, it would be incongruous to say that party autonomy can be exercised in complete disregard of these principles—even if the same has been agreed prior to the disputes having arisen between the parties. There are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties' apparent agreement. A sensible law cannot, for instance, permit appointment of an arbitrator who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed. The Commission hastens to add that Mr P.K. Malhotra, the ex officio member of the Law Commission suggested having an exception for the State, and allow State parties to appoint employee arbitrators. The Commission is of the opinion that, on this issue, there

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cannot be any distinction between State and non-State parties. The concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes. In fact, when the party appointing an adjudicator is the State, the duty to appoint an impartial and independent adjudicator is that much more onerous — and the right to natural justice cannot be said to have been waived only on the basis of a "prior" agreement between the parties at the time of the contract and before arising of the disputes."

(emphasis in original)

24. In ***Voestalpine****, this Court dealt with independence and impartiality of the arbitrator as under:*

"20. Independence and impartiality of the arbitrator are the hallmarks of any arbitration proceedings. Rule against bias is one of the fundamental principles of natural justice which applied to all judicial and quasi- judicial proceedings. It is for this reason that notwithstanding the fact that relationship between the parties to the arbitration and the arbitrators themselves are contractual in nature and the source of an arbitrator's appointment is deduced from the agreement entered into between the parties, notwithstanding the same non-independence and non-impartiality of such arbitrator (though contractually agreed upon) would render him ineligible to conduct the arbitration. The genesis behind this rational is that even when an arbitrator is appointed in terms of contract and by the parties to the contract, he is independent of the parties. Functions and duties require him to rise above the partisan interest of the parties and not to act in, or so as to further, the particular interest of either parties. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent of parties as well as impartial. The United Kingdom Supreme Court has beautifully highlighted this aspect in Hashwani v. Jivraj (2011) 1 WLR 1872 in the following words: (WLR p. 1889, para 45)

"45. … the dominant purpose of appointing an arbitrator or arbitrators is the impartial resolution of the dispute between the parties in accordance with the terms of the agreement and, although the contract between the parties and the arbitrators would be a contract for the provision of personal services, they were not personal services under the direction of the parties."

21. Similarly, Cour de Cassation, France, in a judgment delivered in 1972 in Consorts Ury vs. SA des Galeries Lafayette, Cass. 2e civ., 13-4-1972, JCP, Pt. II, No. 17189 (1972) (France), underlined that:

"an independent mind is indispensable in the exercise of judicial power, whatever the source of that power

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may be, and it is one of the essential qualities of an arbitrator."

22. Independence and impartiality are two different concepts. An arbitrator may be independent and yet, lack impartiality, or vice versa. Impartiality, as is well accepted, is a more subjective concept as compared to independence. Independence, which is more an objective concept, may, thus, be more straightforwardly ascertained by the parties at the outset of the arbitration proceedings in light of the circumstances disclosed by the arbitrator, while partiality will more likely surface during the arbitration proceedings.

* * *

30. Time has come to send positive signals to the international business community, in order to create healthy arbitration environment and conducive arbitration culture in this country. Further, as highlighted by the Law Commission also in its report, duty becomes more onerous in government contracts, where one of the parties to the dispute is the Government or public sector undertaking itself and the authority to appoint the arbitrator rests with it. In the instant case also, though choice is given by DMRC to the opposite party but it is limited to choose an arbitrator from the panel prepared by DMRC. It, therefore, becomes imperative to have a much broadbased panel, so that there is no misapprehension that principle of impartiality and independence would be discarded at any stage of the proceedings, specially at the stage of constitution of the Arbitral Tribunal. We, therefore, direct that DMRC shall prepare a broadbased panel on the aforesaid lines, within a period of two months from today."

27. It may be noted here that the aforesaid view of the Designated Judge in Walter Bau AG vs. Municipal Corporation of Greater Mumbai (2015) 3 SCC 800 was pressed into service on behalf of the appellant in ***TRF Limited*** *and the opinion expressed by the Designated Judge was found to be in consonance with the binding authorities of this Court. It was observed:-*

"32. Mr Sundaram, learned Senior Counsel for the appellant has also drawn inspiration from the judgment passed by the Designated Judge of this Court in ***Walter Bau AG****, where the learned Judge, after referring to Antrix Corpn. Ltd vs. Devas Multimedia (P) Ltd. (2014) 11 SCC 560, distinguished the same and also distinguished the authority in Pricol Ltd. v. Johnson Controls Enterprise Ltd. (2015) 4 SCC 177 and came to hold that: (Walter Bau AG case3, SCC p. 806, para 10)*

"10. Unless the appointment of the arbitrator is ex facie valid and such appointment satisfies the Court exercising jurisdiction under Section 11(6) of the Arbitration Act, acceptance of such appointment as a fait accompli to debar the jurisdiction under Section 11(6) cannot be countenanced in law. …"

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> *33. We may immediately state that the opinion expressed in the aforesaid case is in consonance with the binding authorities we have referred to hereinbefore."*
>
> *28. In **TRF Limited**, the Managing Director of the respondent had nominated a former Judge of this Court as sole arbitrator in terms of aforesaid Clause 33(d), after which the appellant had preferred an application under Section 11(5) read with Section 11(6) of the Act. The plea was rejected by the High Court and the appeal therefrom on the issue whether the Managing Director could nominate an arbitrator was decided in favour of the appellant as stated hereinabove. As regards the issue about fresh appointment, this Court remanded the matter to the High Court for fresh consideration as is discernible from para 55 of the Judgment. In the light of these authorities there is no hindrance in entertaining the instant application preferred by the Applicants.*"

6. Per contra, learned counsel for respondent Nos. 2 to 4 would place reliance on the ruling of the Hon'ble Apex Court rendered in **S.P. Singla Constructions Private Limited vs. State of Himachal Pradesh and another** reported in **(2019) 2 SCC 488**.

7. The law declared by the Hon'ble Apex Court in **Perkins Eastman Architects DPC** (supra) is subsequent to the pronouncement in **S.P. Singla Constructions Private Limited** (supra). That apart, the law, as declared by the Coordinate Bench of the Hon'ble Apex Court, continues to hold the field.

8. In that view of the matter, this Court sees no merit in the contention canvassed by learned counsel for respondent Nos. 2 to 4.

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9. In that view of the matter, the Application is allowed.

10. On query, both the learned counsel would suggest that the dispute may be referred for arbitration by appointing Sri B.S. Verma, a retired Judge of this High Court as the sole arbitrator.

11. The submissions are placed on record.

12. Mr. Justice B.S. Verma (Retired) is, hereby, appointed to act as an Arbitrator to adjudicate the dispute that have arisen between the parties.

13. Let a copy of this order be communicated to Mr. B.S. Verma (Retired Judge), High Court of Uttarakhand, House No. 1386 (New), 432/38 (Old), Civil Lines, Roorkee, District Haridwar.

14. The Application stands disposed of accordingly.

15. There shall be no order as to costs.

16. In sequel thereto, all pending Applications stand disposed of.

G. NARENDAR, C.J.

Dt: 7th January, 2025
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