THE HIGH COURT OF MADHYA PRADESH: JABALPUR

(SB: Hon'ble Shri Justice Ajay Kumar Mittal, Chief Justice)

AC No. 2/2019

APPLICANT : M/s **Balaji Cables Prop. Balaji Cables Pvt. Ltd.**

Versus

RESPONDENT : **Telecom Factory, Jabalpur**

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Appearance:

Shri Arjun Singh, Advocate for the applicant.

Shri Deepak Panjwani, Advocate for the respondent.

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ORDER (Oral)
{ 10.01.2020 }

This application under Section 11(6) of the Arbitration & Conciliation Act, 1996 (in short the "Act") has been filed by the applicant for appointment of an independent arbitrator in terms of clause 20 of the agreement arrived at with the respondent on 13.08.2014 (Annexure A-1) in pursuance to Notice Inviting Tender dated 13.11.2013.

2. It is the case of the applicant that a dispute arose with the respondent after commencement of the supply of the material when the respondent declared the material as 'failed' despite it was passed by their own departmental laboratory. The efforts made by the applicant to amicably settle the dispute had failed. Since the aforesaid agreement dated 13.08.2014 contained an arbitration clause No.20, the applicant vide representation dated 10.11.2015 (Annexure A-2) requested the respondent to initiate the

arbitration proceedings. Thereafter, vide communication dated 04.12.2015 (Annexure A-3) the respondent appointed one Shri S.K. Singh, General Manager, Telecom Factory, Richhai to act as an arbitrator. The applicant submitted his claim before the sole arbitrator on 29.04.2016 (Annexure A-6). It is stated that the arbitrator did not take any action and therefore, the applicant wrote two letters on 29.04.2016 (Annexure A-7) and 07.06.2016 (Annexure A-8) for early settlement. Thereafter, the respondent vide letter dated 20.07.2016 (Annexure A-9) changed the said arbitrator and appointed one Shri S.S. Paraste, Deputy General Manager, Richhai as new arbitrator. The applicant has filed communications as contained in Annexure A-11 to A-14 to show that even after appointment of the new arbitrator, no action has been taken to settle the dispute. Hence, the present application has been filed by the applicant.

3. Learned counsel for the applicant has submitted that even after lapse of more than four years the dispute has not been settled by the arbitrator. It is further submitted that by virtue of Sub-section (5) of Section 12 of the Act, which was inserted by the Arbitration and Conciliation (Amendment) Act, 2015 (Act No.3 of 2016) (for short “the Amendment Act of 2015”), the appointment of inhouse arbitrator is prohibited and therefore, the inhouse arbitrator cannot be permitted to continue with the arbitration proceedings and the current arbitrator could not have been nominated to act as an arbitrator. In this context, learned counsel has placed heavy reliance upon the Supreme Court judgment in **TRF Limited v. Energo Engineering Projects Limited (2017) 8 SCC 377**.

4. In rebuttal, learned counsel for the respondent has contended that reply to the claim has already been filed on 21.08.2019 (Annexure R-1) and copy of the same was sent to the applicant through speed post on 22.08.2019 but vide Annexure R-2 it has been received back with a note that the claimant had left the address. The applicant changed his address without informing the sole arbitrator. By inviting our attention to the judgment of the Supreme Court in **Rajasthan Small Industries Corporation Limited v. Ganesh Containers Movers Syndicate, (2019) 3 SCC 282**, learned counsel has argued that the arbitration proceedings are at the stage of framing the issues and the applicant having participated in the proceedings before the arbitrator for quite some time, is estopped to challenge the appointment of the sole arbitrator. The applicant has not even alleged any biasness on the part of the arbitrator. Therefore, no interference is called for in the ongoing arbitration proceedings.

5. Having heard learned counsel for the parties, I am of the view that the present application deserves to be allowed.

6. Clause 20 of the agreement (Annexure A-1) entered into between the parties provides that in the event of any dispute arising under the agreement, the same shall be referred to the sole arbitration of the CGM, Telecom Factory, Jabalpur or in the circumstances enumerated in clause 20.1 to the sole arbitration of some other person appointed by the CGM, TF, Jabalpur. Since dispute arose between the applicant and respondent, the arbitration clause was invoked by the applicant and accordingly, an inhouse arbitrator was appointed to resolve the dispute and arbitration proceedings

commenced. Clause 20 of the agreement (Annexure A-1), which was acted upon, reads as under:-

> "**20. ARBITRATION**
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> **20.1** In the event of any question, dispute or difference arising under this agreement or in connection there-with (except as to the matters, the decision to which is specifically provided under this agreement), the same shall be referred to the sole arbitration of the CGM, TF, JABALPUR or in case his designation is changed or his office is abolished, then in such cases to the sole arbitration of the officer for the time being entrusted (whether in addition to his own duties or otherwise) with the functions of the CGM, TF, JABALPUR or by whatever designation such an officer may be called (hereinafter referred to as the said officer), and if the CGM, TF, JABALPUR or the said officer is unable or unwilling to act as such, then to the sole arbitration of some other person appointed by the CGM, TF, JABALPUR or the said officer. The agreement to appoint an arbitrator will be in accordance with the Arbitration and Conciliation Act, 1996 as amended from time to time. There will be no objection to any such appointment on the ground that the arbitrator is a Government servant or that he has to deal with the matter to which the agreement relates or that in the course of his duties as a Government Servant he has expressed his views on all or any of the matters in dispute. The award of the arbitrator shall be final and binding on both the parties to the agreement in the event of such an arbitrator to whom the matter is originally referred, being transferred or vacating his office or being unable to act for any reason whatsoever, the CGM, TF, JABALPUR or the said officer shall appoint another person to act as an arbitrator in accordance with terms of the agreement and the person so appointed shall be entitled to proceed from the stage at which it was left out by his predecessors.
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> **20.2** The arbitrator may from time to time with the consent of both the parties enlarge the time frame for making and publishing the award. Subject to the aforesaid, Arbitration and Conciliation Act, 1996 and the rules made there under, any modification thereof for the time being in force shall be deemed to apply to the arbitration proceeding under this clause."
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> (emphasis supplied)

7. In Clause 20.1 of the agreement, the parties have agreed that the agreement to appoint an arbitrator will be in accordance with the Act as amended from time to time. Further, Clause 20.2 of the agreement provides that the arbitrator may from time to time with the consent of both the parties enlarge the time frame for making and publishing the award and subject to the same, the Act and the rules made thereunder, any modification thereof for the time being in force shall be deemed to apply to the arbitration proceedings under the said clause. Thus, in terms of Clause 20.1 of the agreement, any modification made in the Act or the Rules framed thereunder shall be deemed to apply to the arbitration proceedings under clause 20 of the agreement in question.

8. Section 12 of the Act, which has been relied upon by the learned counsel for the applicant, deals with the grounds for challenge. By way of Amendment Act of 2015, Sub-section (5) has been inserted, which reads as under:-

> "**12. Grounds for challenge**.
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> *** *** ***
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> (5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:
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> Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."

Sub-section (5) of Section 12 of the Act refers to the Seventh Schedule which pertains to arbitrator's relationship with the parties or counsel wherein certain categories of the Arbitrators, who shall be ineligible

to be appointed, have been specified. For the purposes of the present controversy, the relevant clauses of the seventh schedule read as under:-

> "**Arbitrator's relationship with the parties or counsel**
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> 1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party;
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> 2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.
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> *** *** ***
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> 5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.
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> 12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.
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> *** *** ***"

9. On going through the aforesaid two provisions, it is apparent that even if there is any agreement between the parties to the contrary, the category of the persons, who are specified in the seventh schedule having relationship with the parties or the counsel or the subject-matter of the dispute, shall not be eligible to be appointed as an arbitrator after the coming into force of the amendment to the Act w.e.f. 23.10.2015. The category of the ineligible persons defined in the seventh schedule are that the arbitrator should not be an employee, consultant, advisor or the person who has any other past or present business relationship with a party. The person to be an arbitrator should also not be representing or advising one of the parties and should not be a Manager, Director or part of the management. However, in terms of the proviso attached to Sub-section (5) of Section 12 of the Act, the applicability of the aforesaid ineligibility condition can be waived by the parties after the dispute has arisen between them by an express agreement in writing. Nothing has been brought to the notice of this Court by the respondent that

after the dispute had arisen, they have entered into an agreement in writing expressly waiving the applicability of sub-section (5) of Section 12 of the Act.

10. Looking from another perspective, as to whether the Amendment Act of 2015 would be applicable in the present case, it may be noticed that the commencement of the arbitral proceedings is governed by Section 21 of the Act, which reads as under:-

> "**21. Commencement of arbitral proceedings**. - Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

11. In the instant case, the demand for appointment of an arbitrator in terms of clause 20 of the agreement (Annexure A-1) to settle the dispute was made by the applicant vide representation dated 10.11.2015 (Annexure A-2) and thereafter, the respondent vide communication dated 04.12.2015 (Annexure A-3) appointed an arbitrator. On the other hand, the Amendment Act came into force w.e.f. 23rd October, 2015 i.e. even prior to the commencement of the arbitration proceedings. Thus, since the arbitration proceedings had commenced after the Amendment Act of 2015 had come into force and sub-section (5) of Section 12 was inserted in the Act providing for ineligibility of the person in accordance with the seventh schedule to be appointed or to continue to act as an arbitrator, therefore, the Amendment Act of 2015 shall apply with full force to the arbitral proceedings, which were commenced in the present case on 10.11.2015 by way of demand made vide Annexure A-2.

12. In view of the above, by virtue of Sub-section (5) of Section 12 of the Act, the inhouse arbitrator i.e. General Manager, Telecom Factory, who was appointed first in time on 04.12.2015 to settle the dispute himself was ineligible to act as an arbitrator and therefore, he could not have nominated another person i.e. the current arbitrator to act as an arbitrator on 20.07.2016. Hence, the current arbitrator cannot continue with arbitration proceedings. Even otherwise, the arbitration proceedings are at its initial stage inasmuch as the respondent had filed the reply to the claim petition only on 21.08.2019 i.e. after more than three years of changing the arbitrator without any satisfactory explanation for the inordinate delay.

13. Examining the validity of nomination of an arbitrator by named arbitrator in the wake of Sub-section (5) of Section 12 of the Act, the Supreme Court in **TRF Limited** (**supra**) held that once the named arbitrator becomes ineligible by operation of law, he cannot nominate another person as an arbitrator. The said judgment is squarely applicable in the present case. The relevant extract of the said judgment reads as under:-

> "**12**. Sub-section (5) of Section 12, on which immense stress has been laid by the learned counsel for the appellant, as has been reproduced above, commences with a non-obstante clause. It categorically lays down that if a person whose relationship with the parties or the counsel or the subject matter of dispute falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator. There is a qualifier which indicates that parties may, subsequent to the disputes arisen between them, waive the applicability by express agreement in writing. The qualifier finds place in the proviso appended to sub-section (5) of Section 12. On a careful scrutiny of the proviso, it is discernible that there are fundamentally three components, namely, the parties can waive the applicability of the sub-section; the said waiver can only take place

subsequent to dispute having arisen between the parties; and such waiver must be by an express agreement in writing.

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17. First we shall address the issue whether the Court can enter into the arena of controversy at this stage. It is not in dispute that the Managing Director, by virtue of the amended provision that has introduced sub-section (5) to Section 12, had enumerated the disqualification in the Seventh Schedule. It has to be clarified here that the agreement had been entered into before the amendment came into force. The procedure for appointment was, thus, agreed upon. It has been observed by the designated Judge that the amending provision does not take away the right of a party to nominate a sole arbitrator, otherwise the legislature could have amended other provisions. He has also observed that the grounds including the objections under the Fifth and the Seventh Schedules of the amended Act can be raised before the Arbitral Tribunal and further when the nominated arbitrator has made the disclosure as required under the Sixth Schedule to the Act, there was no justification for interference. That apart, he has also held in his conclusion that besides the stipulation of the agreement governing the parties, the Court has decided to appoint the arbitrator as the sole arbitrator to decide the dispute between the parties.

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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."

14. The respondent placed heavy reliance upon the judgment of the Supreme Court in **Rajasthan Small Industries Corporation Ltd. (supra**) to contend that the applicant having participated in the proceedings before the arbitrator, cannot be heard to seek appointment of an independent arbitrator. In the facts of the said case, the agreement between the parties was entered into on 28.1.2000 and the arbitration proceedings commenced in 2009 i.e. prior to coming into force of the Amendment Act of 2015 and there was nothing to reveal that the parties had agreed that the provisions of the new Act shall apply in relation to the arbitral proceedings. In my considered opinion, the said judgment is not applicable in the present case being distinguishable on facts because in the present case, it has already been observed that the Amendment Act came into force much prior to the arbitral proceedings were commenced by issuing demand notice for appointment of an arbitrator.

15. In view of the foregoing reasons, it is just and proper that an independent arbitrator is appointed to adjudicate and decide the dispute between the parties including their claims, counter-claims and objection.

16. On a query put to learned counsel for the parties to suggest the name of a person to be appointed as an arbitrator, there was consensus between them for appointment of Shri Justice H.P. Singh, Former Judge of this High Court residing at Jabalpur to be an arbitrator.

17. Accordingly, Shri Justice H.P. Singh, Former Judge of this High Court residing at Jabalpur is appointed as arbitrator in this case to adjudicate upon

and decide all the disputes between the parties including their claim, counter-claim and objections relating to the contract in question.

18. All other aspects relating to the cost of the proceedings and fees are left open to be determined by the arbitrator while keeping in view the law applicable and compliance of the provisions contained in Fourth Schedule to the Arbitration and Conciliation Act, 1996 (as amended up to date). Resultantly, this petition stands **disposed of** accordingly.

(**AJAY KUMAR MITTAL**)
Chief Justice

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