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

% **Date of decision: 30.01.2020**

\+ ARB.P. 75/2020 and IA 1322/2020

BIRLA CABLE LIMITED ..... Petitioner

Through: Mr. Narendera M. Sharma, Mr. Abhishek Sharma and Mr. Aditya Singh, Advocates

versus

BHARAT SANCHAR NIGAM LIMITED ..... Respondent

Through: Mr. Dinesh Agnani, Sr. Advocate with Ms. Leena Tuteja, Advocate

CORAM:
HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J. (ORAL)

1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('Act') for appointment of the Sole Arbitrator.

2. Issue notice.

3. Ms. Leena Tuteja, Advocate accepts notice on behalf of the respondent.

4. Mr. Agnani, learned Senior Counsel appearing for the respondent submits that a panel of Arbitrator has been prepared by the BSNL and Mr. R.N. Prabhakar is already nominated as Arbitrator to adjudicate the dispute between the parties. Learned counsel for the petitioner, however, points out that in view of the judgment of the Supreme Court in ***Perkins Eastman***

Architects DPC & Anr. vs. HSCC (India) Ltd. 2019 SCC Online SC 1517, respondents have forfeited the right to make a unilateral appointment of an Arbitrator and the Arbitrator so appointed will be ineligible having been appointed by the respondent. In my view, the contention of the learned counsel for the petitioner is right. In ***Perkin*s (supra)**, the Supreme Court has held as under :-

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

5. Therefore, the Arbitrator although appointed from a Panel but having been appointed by the respondent unilaterally cannot be eligible to adjudicate the disputes between the parties.

6. At this stage, Mr. Agnani, learned senior counsel has handed over a copy of the panel prepared in which one of the Arbitrators is a former Judge of this Court. A copy of the same has been handed over to the counsel for the petitioner who, after perusal of the panel, on instructions, submits that he

has no objection to the appointment of Justice Gian Prakash Mittal, former Judge of this court as the Sole Arbitrator.

7. With the consent of the parties, Justice Gian Prakash Mittal is appointed as the Sole Arbitrator. Since the appointment is with consent of the petitioner, the learned Arbitrator will not suffer any disability on account of the law laid down by Supreme Court in ***Perkins (supra)***.

8. The address and mobile number of the learned Arbitrator is as under:

Hon'ble Mr. Justice Gian Prakash Mittal (Retd.)
H-37, Green Park Extension,
New Delhi.
Mobile: 9910386419, 8700726242

9. The learned Arbitrator shall give disclosure under Section 12 of the Act before entering upon reference.

10. Fee of the Arbitrator shall be fixed as per Fourth Schedule of the Act.

11. The petition and the application filed herewith are allowed in the aforesaid terms.

JYOTI SINGH, J

JANUARY 30, 2020
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