

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

+ O.M.P. 380/2009

THE GENERAL MANAGER & ANR. Petitioners

Through: Mr. A.S. Dateer, Adv.

versus

M/S OBEROI THERMIT PVT. LTD. AND ANR. Respondents

Through: None.

Date of Decision : 20th October, 2009

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

J U D G M E N T

MANMOHAN, J : (Oral)

1. Since despite service of notice none has appeared for respondent No. 1, I have no other option but to proceed further with the final disposal of the present case.
2. I may mention that the present petition has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "Act, 1996") challenging the Award dated 11th April, 2009 passed by respondent no. 2.

3. Learned counsel for the petitioner has sought to challenge the said Award on the ground that the constitution of the Arbitral Tribunal was not in accordance with the agreement executed between the parties. In this context, he relied upon clause 64 (3) (a) (ii) of the General Conditions of the Contract (in short “GCC”). Said clause reads as under:

“In cases not covered by clause 64(3) (a) (i), the arbitral tribunal shall consist of a panel of three gazetted Rly. Officers not below JA grade, as the arbitrators. For this purpose, the railway will send a panel of more than 3 names of Gazetted Rly. Officers of one of more department of the Rly. to the contractor who will be asked to suggest to General Manager upto 2 names out of panel for appointment as contractor’s nominee. The General Manager shall appoint at least one out of them as the contractor’s nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel, duly indicating the presiding arbitrator from amongst the 2 arbitrators so appointed. While nominating the arbitrators it will be necessary to ensure that one of them is from the accounts department. An officer of Selection Grade of the accounts department shall be considered of equal status to the officers in SA grade of other departments of the railways for the purpose of appointment of arbitrators.”

4. In this connection, Mr. Dateer relied upon a judgment of Supreme Court rendered in case of ***Union of India & Anr. Vs. M.P. Gupta*** reported in ***(2004) 10 SCC 504***. The relevant portion of the said judgment is reproduced hereinbelow :

“4. In view of the express provision contained therein that two gazette railway officers shall be

appointed as arbitrators, Justice P.K. Bahri could not be appointed by the High Court as the sole arbitrator. On this short ground alone, the judgment and order under challenge to the extent it appoints Justice P.K. Bahri as sole arbitrator is set aside. Within 30 days from today, the appellants herein shall appoint two gazetted railway officers as arbitrators. The two newly appointed arbitrators shall enter into reference within a period of another one month and thereafter the arbitrators shall make their award within a period of three months.”

5. However, I find that in the present case the Arbitrator was appointed vide order dated 4th July, 2007 passed by a learned Single Judge of this Court in Arb. P. 80/2007. The said order reads as under :

“The petitioner has filed the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996(‘the said Act’ for short) seeking appointment of an arbitrator in view of the failure of the respondent to so appoint the arbitrator as per the Arbitration Clause 64 of the General Conditions of Contract.

The respondent invited the tender for the work of :

“Alumino Thermit Welding of 52 Kg. (90 UTS), 60 Kg (90 UTS) rail on cess/ in situ by SKV/SPW process in the section of ADEM/DLI and ADEN/TKD”

The petitioner submitted a tender vide quotation dated 04.04.2003 and the tender was so awarded to the petitioner on 31.07.2003 for the work. The work was delayed and the date of completion was extended without levying penalty. The petitioner is aggrieved by the subsequent letter dated 21.04.2005 imposing penalty of Rs. 11,80,000/- on the petitioner as it is alleged that the delays were on the part of the respondent. The petitioner had also other claims against the respondent and thus

invoked the arbitration clause vide letter dated 28.06.2006. Since the arbitrator was not appointed, the present petition has been filed.

Learned counsel for the respondent states that respondent has appointed an arbitrator on 21.06.2007.

It is trite to say that in case a party invokes an arbitration clause and there is failure of the opposite party to appoint an arbitrator within the stipulated time of 30 days and an arbitrator is appointed after filing of the petitioner under Section 11 (6) of the said Act, the respondent loses the power to appoint such an arbitrator. This aspect is clear from the Full Bench Judgment of this Court in HBHL-VKS (J.V.) Vs. Union of India & Ors. and V.P. Electricals Vs. Union of India & Ors. 2007 (1) Arb. L.R. 252 (Delhi) (FB) where conclusion was set out in paragraph 40 as under:

“40. Thus, we record our answer to the two questions referred to the Larger Bench as follows:

(i) Once the party, which has been served with the demand notice in terms of arbitration clause, fails or refuses to act in making appointment in terms of arbitration clause within 30 days or in any case prior to institution of a petition by the other side under Section 11 (6) of the Act, then its right to make such appointment ceases or is forfeited. Such cessation is absolute in terms of the judgment of the Supreme Court in Datar Switchgears case and cannot be revived.

(ii) The court has jurisdiction to take necessary measures in terms of Section 11 (6) of the Act and this expression would take within its ambit and scope, the power to make appointment of independent and impartial arbitrator with reference to the accepted arbitration clause, unless the court in its discretion directs an institution specified in the arbitration clause not in default, to make such an appointment”

The petitioner is not agreeable to the arbitrator appointed by the respondent.

In view of the facts set out hereinabove, this Court would have to appoint the arbitrator. In view thereof, Sh. K.D. Bali, Director General Works (Retd.), S-147, Panchsheel Park, New Delhi is appointed as the sole arbitrator with consent of learned counsel for the parties to enter upon reference and adjudicate the disputes between the parties. Sitting fee of the arbitrator will be fixed by the arbitrator himself subject to a maximum total fee of Rs. 60,000/- to be shared equally by the parties.

Petition stands allowed in the aforesaid terms leaving the parties to bear their own costs.

A copy of this Order be sent expeditiously to the arbitrator.

Dasti to the learned counsel for the parties.”

6. Since the petitioner was of the view that the aforesaid order was contrary to Clause 64 (3) (a) (ii) of GCC, it filed an application under Section 152 for correction of the said order dated 04.07.2007. However, the petitioner's application was dismissed by a learned Single Judge of this Court vide order dated 31.10.2008. The relevant portion of the said order reads as under :

“After more than 15 months, the respondent has now filed the present application for recall of the said order on the ground that as per the arbitration clause each party is required to appoint one arbitrator. Counsel for the applicant/respondent has relied upon the decision in case of Union of India and Another Vs. M.P. Gupta (2004) SCC 504 in support of his contention that each party should have been asked to appoint an arbitrator. The said judgment would have been relevant and should

have been brought to the notice of the Court when order dated 04.07.2007 was passed. The said judgment does not justify recall of the said order. Conditions of Section 152 of the Code of Civil Procedure invoked by the applicant-respondent are not satisfied in the present case as there is no accidental slip or arithmetical/clerical error. No ground for recall is made out. The application is belated and filed 15 months after order dated 04.07.2007 was passed.”

7. In my opinion, since the arbitrator was appointed by this Court and the aforesaid orders dated 04.07.2007 and 31.10.2008 have attained finality, it is not open to the petitioner now to challenge the same by way of an objection petition under Section 34 of Act, 1996. Moreover, judgment in **M.P. Gupta**'s case (supra) referred to by Mr. Dateer has no application to the present matter as in the said case Union of India had filed an appeal against the initial order appointing an arbitrator in an application filed under Section 20 of Arbitration Act, 1940. In any event, I being a coordinate Court, cannot take a different view from the one taken vide orders dated 04.07.2007 and 31.10.2008.

8. On merits learned counsel for the petitioner submitted that the Arbitrator failed to appreciate that the penalty of Rs. 12,80,000/- had been correctly imposed by the Railways under Clause 63 of GCC. According to the learned counsel as the Arbitrator had passed the Award without looking at the vital documents he had legally misconducted himself.

9. However, I have perused the reasoning given by the learned Arbitrator

which reads as under:

“I have considered the pleadings, arguments and submissions of both the parties in this matter carefully. I have also gone into the details of the entire case and its background of relationship that came to exist between the parties. I have also considered the strict action taken by the railways under clause 6.3 relating to imposition of Rs. 20,000/- per defective joint adopted by the railways against the stated normal penalty of Rs. 100/- per defective joint. After careful consideration I am of the opinion that this recovery of Rs. 20,000/- per defective joint was out of the bad relationship developed between the parties and the strict attitude taken by the railways in the matter and I hold that this extra heavy penalty is not justified and is arbitrary and unreasonable. I hold that the penalty of Rs. 100/- per defective joint or maximum of Rs. 200/- per defective joint would have served the end of justice. Considering a penalty of Rs. 200/- per defective joint the total penalty for 64 defective joints is $64 \times \text{Rs. } 200 = \text{Rs. } 12,200/-$. In my opinion this penalty of Rs. 12,200/- is justified and should be recovered from the contractor from his award. Award made accordingly.

10. In my opinion, the arbitrator has taken a plausible view and as this Court is not an Appellate Authority and as there is no ground in the objection petition that the learned Arbitrator has acted contrary to the Statute or to the contract, present objection petition is beyond the scope of Section 34 of Act, 1996.

11. Learned counsel for the petitioner lastly stated that the Arbitrator had not considered the counter claim of the Railways. However, I find from a perusal of the record that the only counter claim was for recovery of

Rs. 12,80,000/- imposed by the Railways under Clause 63 of the GCC. The aforesaid submission has been rejected by the learned Arbitrator as recorded hereinabove.

12. Consequently, the present objection petition being devoid of merits, is dismissed.

MANMOHAN, J

OCTOBER 20, 2009
mr