

GAHC010190822023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Arb.P./29/2023

M/S. RAITANI ENGINEERING WORKS PVT. LTD.,
A COMPANY CONSTITUTED UNDER THE INDIAN COMPANIES ACT, 1956
HAVING ITS REGISTERED OFFICE AND HEAD OFFICE AT CAMPUS OF M.M.
CHAUDHURY, P.B. ROAD, REHABARI, GUWAHATI-781008, ASSAM,
REPRESENTED BY ONE OF ITS DIRECTORS SHRI MAYUR RAITANI, AGE-
52 YEARS, S/O- SRI ANAND RAM RAITANI.

VERSUS

THE UNION OF INDIA AND ANR
REPRESENTED BY THE GENERAL MANAGER (CONSTRUCTION), N.F.
RAILWAYS, MALIGAON, GUWAHATI-11, DIST. KAMRUP(M), ASSAM, PIN-
781011.

3:THE CHIEF ENGINEER CON-I
MALIGAON
GUWAHATI
DISTRICT KAMRUP METRO
ASSAM

4:THE CHIEF ENGINEER/CON-I
N.F. RAILWAYS
MALIGAON
GUWAHATI-11
DIST. KAMRUP(M)
ASSAM
PIN- 781011

Advocate for the Petitioner : MR. A BISWAS

Advocate for the Respondent : DY.S.G.I.

**BEFORE
HONOURABLE MR. JUSTICE MANISH CHOUDHURY**

ORDER

Date : 05-10-2023

The instant petition is preferred under Section 14[1][b] and Section 15[1][a] read with Section 15[2] of the Arbitration & Conciliation Act, 1996 [‘the 1996 Act’, for short] seeking appointment of a substitute Arbitrator.

2. Heard Mr. A. Biswas, learned counsel for the petitioner and Mr. H. Gupta, learned Central Government Counsel for both the respondents.

3. The facts, in brief, leading to the filing of the present petition can be narrated, in brief, as follows :

3.1. The respondent North-East Frontier Railway [N.F. Railway] published a Tender Notice vide Tender no. CE/CON/S-L/MB/2006/02 for a contract work :- ‘Design & construction of foundation, sub-structure and super-structure of major bridge No. III/69 [Span 1X24.4 m] at KM 105/826.00 & bridge No. III/79 [Span 1 X 24.4 m] at KM 109/940.000 on pile foundations, between New Haflong – Jatinga Lumpur stations, on permanent diversion including earthwork in filling/cutting behind abutments for making formation at approaches on either side of bridge approaches and all other ancillary works in connection with Lumding – Silchar Gauge Conversion Project’ [‘the Contract-Work’, for short]. The petitioner participated in the competitive bidding process initiated vide Tender no. CE/CON/S-L/MB/2006/02 by submitting his original offer on 10.03.2006. Subsequently, the matter was negotiated and the petitioner submitted negotiated offers on 15.05.2006 & 12.06.2006. By a Letter of

Acceptance bearing no. W/362/CON/S-L/MB/2006/02 dated 22.06.2006, the Tendering Authority in the N.F. Railway for and on behalf of the President of India accepted the negotiated offer of the petitioner at a total cost of Rs. 5,37,94,300/-, as per the enclosed schedule of rates & quantities therein. As per the Letter of Acceptance, the petitioner was authorized to commence the Contract-Work on the strength of the Letter of Acceptance to ensure completion of the Contract-Work within a period of 18 [eighteen] months as per the condition of the Tender. By the Letter of Acceptance, the petitioner was asked to complete formalities like deposit of initial security deposit, submission of the proposed programme of work, etc. It was mentioned that the Letter of Acceptance shall be legal and enforceable contract between the petitioner and the respondent N.F. Railway. Thereafter, the contract agreement being Contract-Agreement no. CON/S-L/989 dated 02.09.2006 [‘the Contract-Agreement’, for short] was executed between the President of India acting through the Railway Administration on the one part and the petitioner as the Contractor on the other part for execution of the Contract-Work. The petitioner was, thus, obligated to perform the Contract-Work as per the conditions set forth in the General Conditions of Contract and the specification of the Northeast Frontier Railway, 1998 edition and the Special conditions and Special Specifications, if any, and in conformity with drawings thereto annexed. The Contract-Agreement mentioned the total approx. value of the Contract-Work as Rs. 5,37,94,300/-. After the Letter of Acceptance and execution of the Contract-Agreement, the petitioner started executing the Contract-Work.

3.2. It was the case of the petitioner that during the execution of the Contract-Work, it had faced numerous obstacles which, according to the petitioner, prevented the petitioner from executing and completing the Contract-Work

within the stipulated contract period. It had been projected that the obstacles faced by the petitioner during the execution of the Contract-Work were not attributable to any latches on the part of the petitioner but those were due to latches attributable on the part of the respondent N.F. Railway or due to serious law and order problem which was, at that period of time, prevailing in and around the work-site. The contention was that the respondent N.F. Railway authorities despite being made aware of the obstacles faced by the petitioner in executing the Contract-Work by various letters and correspondences from the petitioner's side from time to time, after granting extension of the completion period of the Contract-Work only till 30.06.2008 without imposing any liquidated damage, proceeded to terminate the Contract-Agreement vide a Termination Letter dated 17.09.2008 with effect from 30.06.2008. According to the respondent N.F. Railway authorities, it was the petitioner who had failed to complete the Contract-Work by the agreed date of completion and also by the extended date of completion i.e. within 30.06.2008. It was observed in the Termination Letter dated 17.09.2008 that the petitioner had failed to apply for further extension of period of completion on valid and reasonable ground as acceptable to the N.F. Railway authorities. It was the case of the petitioner that apart from terminating the Contract-Agreement dated 02.09.2006, the respondent N.F. Railway authorities failed to make payment of the contractual dues payable to the petitioner to the extent of the Contract-Work executed by the petitioner.

4. As serious disputes and difference arose between the petitioner and the respondent N.F. Railway authorities, the matter stood referred for arbitration in terms of the Contract-Agreement no. CON/S-L/989 dated 02.09.2006. Initially, the matter was referred to an arbitral panel comprising of three retired Railway

Officers. The arbitral panel of three retired Railway Officers passed an Award on 07.12.2013 rejecting the claims of the petitioner. The said Arbitral Award dated 07.12.2013 came to be challenged by the petitioner under Section 34 of the 1996 Act before the Court of learned District Judge, Kamrup [M], Guwahati and the same was numbered as Misc. Arbitration no. 09/2014. By a Judgment dated 28.02.2018 passed by the learned District Judge, the Arbitral Award dated 07.12.2013 came to be set aside.

5. Subsequent to the Judgment dated 28.02.2018 passed in Misc. Arbitration no. 09/2014, the petitioner approached this Court by filing an application under Section 11[6] of the 1996 Act seeking appointment of an Arbitrator. The said application which was registered as Arbitration Petition no. 12/2018, was disposed of by an order dated 02.03.2020 by appointing Hon'ble Mr. Justice P.C. Phukan [Retired] as the Sole Arbitrator.

6. The first sitting of the Arbitral Tribunal was held on 18.03.2020 whereby the parties were directed to appear before the Arbitral Tribunal on 18.04.2020. But due to onset of Covid-19 pandemic in the meantime and declaration of lockdown throughout the country including in the State of Assam, the proceedings of the Arbitral Tribunal came to a halt with postponement of the proceedings on numerous occasions. It was finally on 11.06.2022, the Arbitral Tribunal formulated the time-frame of submission of pleadings by the parties and filing of the draft issues. Pursuant to the Order dated 11.06.2022, the pleadings were duly exchanged between the parties and copies were submitted before the Arbitral Tribunal. The Statement of Claims of the petitioner as the claimant was submitted on 08.08.2022 whereas the Statement of Defence along with a Counter Claim was submitted on behalf of the respondent N.F. Railway

authorities on 27.09.2022. Thereafter, a Rejoinder and the Statement of Defence on behalf of the petitioner were submitted on 14.11.2022. It has been averred that due to health reasons, the Sole Arbitrator could not hold further sitting of the Arbitral Tribunal in the period subsequent to 11.06.2022. When the parties were expecting to receive notices as regards further sitting of the Arbitral Tribunal they received a letter dated 31.07.2023 from the Sole Arbitrator whereby the Sole Arbitrator informed the parties that he had rendered his resignation as the Sole Arbitrator in the arbitration matter between the petitioner and the respondent N.F. Railway authorities with immediate effect. In the letter dated 31.07.2023, the Sole Arbitrator has mentioned the reason as health ground behind his resignation.

7. It is in the backdrop of the above fact situation obtaining in the case in hand, the prayer made in the present petition is to be considered. The mandate of the Arbitrator, appointed in terms of the earlier order dated 02.03.2020 passed in Arbitration Petition no. 12/2018, had come to an end as the Arbitrator had withdrawn from his office by tendering his resignation on health ground. Sub-Section [1] of Section 14 of the 1996 Act has provided that the mandate of an arbitrator shall terminate and he shall be substituted by another arbitrator, if [a] he becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay; and [b] he withdraws from his office or the parties agree to the termination of his mandate. Sub-Section [1] of Section 15 of the 1996 Act has inter alia laid down that the mandate of an arbitrator shall terminate [a] where he withdraws from office for any reason; or [b] by or pursuant to an agreement of the parties. Thus, from the provisions of Section 14[1] and Section 15[1] of the 1996 Act, it is discernible that the mandate of an arbitrator gets terminated if he withdraws from his office for any reason. Sub-

Section [1] of Section 14 has further provided that on termination of the mandate of an appointed arbitrator, he can be substituted by another arbitrator. Sub-Section [2] of Section 15 of the 1996 Act has provided that where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced. It has been provided in sub-section [3] of Section 15 of the 1996 Act, unless otherwise agreed by the parties, where an arbitrator is replaced under sub-section [2] of Section 15, any hearings previously held may be repeated at the discretion of the arbitral tribunal. It has been further provided in Section 15[4] that unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section shall not be invalid solely because there has been a change in the composition of the arbitral tribunal.

8. In view of the above provisions contained in Section 14 and Section 15 of the 1996 Act, this Court is of the considered view that the parties can approach the Court in the event the mandate of an arbitrator appointed earlier is terminated due to withdrawal from office by the arbitrator for any reason.

9. It has been submitted at the Bar that the parties have agreed for appointment of Hon'ble Mr. Justice H.N. Sharma, a Former Judge of this Court as the substitute Arbitrator.

10. In view of such consensus arrived at by the parties as regards the substituted Arbitrator, this Court in exercise of the powers conferred by Section 14[1][b] and Section 15[1][a] read with Section 15[2] of the Arbitration & Conciliation Act, 1996 appoints Hon'ble Mr. Justice H.N. Sharma, Former Judge of this Court as the substitute Arbitrator to decide all the disputes arising out of

the Contract-Agreement executed between the parties, subject to mandatory declaration required to be made under Section 12 of the 1996 Act with respect to independence and impartiality and ability to devote sufficient time to complete the arbitration proceedings within the prescribed period as per Section 29-A of the Arbitration and Conciliation Act, 1996.

11. A copy of this order be despatched to Hon'ble Mr. Justice H.N. Sharma, Former Judge of this Court at his address for his information and necessary action. The parties will appear before the learned Arbitrator within a period of 1 [one] month from today and the learned Arbitrator will thereafter, proceed in accordance with law.

12. With the observations made and the direction given above, the present petition stands disposed of.

JUDGE

Comparing Assistant