

GAHC040000542021



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

Case No. : Arb.P./1/2021

S.P Singla Construction Pvt.Ltd and 2 others
THROUGH ITS AUTHORIZED REPRESENTATIVE HAVING REGISTERED
OFFICE AT 1006-1007, PEARLS BEST HEIGHT 1, A-5, NETAJI SUBHASH
PLACE, PITAMPURA, NEW DELHI AND ITS CORPORATE OFFICE AT 47
SECTOR-9, PANCHULA (HARYANA)

VERSUS

Border Road Organisation and 2 Ors.
THROUGH DIRECTOR GENERAL BORDER ROADS, E8 SEEMA SADAK
BHAWAN, RING ROAD, DELHI CANTT, NEW DELHI.

2:THE CHIEF ENGINEER
Project Udayak
Border Roads Organisation
Pin-931715
C/O 99 APO

3:THE O.C CONTRACT
Border Roads Organisation
1443 BCC (GREF)
C/O 99 APO

Advocate for the Petitioner : D Yoka

Advocate for the Respondent : DSGI

**BEFORE
HONBLE MRS. JUSTICE SUSMITA PHUKAN KHAUND**

ORDER

Date : 06-05-2024

Heard Mr. L. Bam, learned counsel for the petitioner. Also heard Mr. M. Kato, learned DSGI for all the respondents.

2. This petition is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, (hereinafter referred as "the Act") with a prayer to refer the dispute between the petitioner and the respondents in relation to a contract for construction of bridge over the river Sisseri at NH-52, Arunachal Pradesh, to Arbitration.

3. The petitioner in this case is S.P Singla Construction Private Limited and the respondents arrayed in this case are the Border Roads Organisation represented by Director General Border Road, the Chief Engineer, Project Udayak and the OC (Contract), Border Road Organisation as respondents No.1, 2 and 3 respectively. The S.P Singla Construction Private Limited is a private company with its registered office at 1006-1007, Pearls Best Height 1, A-5 Netaji Subhash Place, Pitampura, New Delhi.

4. The respondents floated tender dated 01.04.2008 Numbered as CA No.CE(P)UDK/46/2008-2009 (hereinafter referred to as the

said tender). The petitioner participated in the bidding process and work order was issued in favour of the petitioner for a lump sum amount of Rs.12,69,00,000/-(Rupees Twelve Crores Sixty Nine Lakhs) stipulated within 24 months i.e. within 06.12.2010.

5. It is submitted by the learned counsel for the petitioner that the work could not be completed by 06.12.2010, despite the fact that the petitioner had diligently performed its obligation. However, due to some unforeseen contingencies, the work could not be completed within the time frame. It is further submitted on behalf of the petitioner that the work was completed on 15.10.2019, but the respondent unauthorizedly and illegally disagreed to settle the amount of Rs.49,00,000/-(Rupees Forty Nine Lacs)only which includes the expenses incurred for completion of the entire work.

6. It is apt to mention at this juncture that the original amount was for Rs.28,00,00,000/-(Rupees Twenty Eight Crores)only which has been raised by an amount of Rs.49,00,000/-(Rupees Forty Nine Lakhs)only. As the dispute arose regarding the Final Bill, the petitioner sought reference of dispute to arbitration as prescribed under Clause 70 of the General Conditions of Contracts (GCC).

7. The petitioner vide communication dated 22.08.2020, raised objection to the conduct of the respondent relating to the purported

execution of the 'No Demand Certificate' and 'Final Bill' as being binding to the petitioner. In response, the respondents vide communication dated 21.09.2020 and 14.10.2020, asked the petitioner to waive the applicability of Section 12(5) of the Act, so that an arbitrator may be appointed in terms of Clause 70 of the GCC. Through the communication, the respondent expressed their commitment for resolution of the claims of the petitioner through arbitration.

8. The respondents have filed an affidavit-in-opposition stating, *inter alia* that the work project, namely, 'Design and Construction of 200 M Span Major PMT PSC box girder type double-lane Bridge over River Sisseri at Km 594.945 on road Jonai-Pasighat-Ranaghat-Mebo-Dambuk-Bomjur of NH-52 in the State of Arunachal Pradesh" was awarded to the petitioner-contractor. Annexure-1 of the objection is the acceptance of the tender for Rs.12,69,00,000/-(Rupees Twelve Crores Sixty Nine Lakhs)only. It is further submitted that the responsibility of the road sector was handed over to the Head Quarter, Chief Engineer(P) Brahmanik due to transfer of executing unit 1443 BCC to HQ CE (P) Brahmanik.

9. I have considered the submissions at the bar and have perused the materials available on records.

10. Unequivocally, it is submitted by learned counsel for the petitioner and by the learned counsel for the respondents that any dispute arising in relation to the tender can be referred to the arbitrator as per Clause 70 of the General Conditions of Contract (GCC) for Lump Sum Contracts (IAFW-2159) and Item Rate Contracts (IAFW-1779A). The Clause 70 of the General Conditions of Contracts (GCC) is reproduced herein below as a ready reckoner:-

“70. Arbitration.—All disputes, between the parties to the Contract (other than those for which the decision of the C.W.E. or any other person is by the Contract expressed to be final and binding) shall, after written notice by either party to the Contract to the other of them be referred to the sole arbitration of an Engineer Officer to be appointed by the authority mentioned in the tender documents.

Unless both parties agree in writing such reference shall not take place until after the completion or alleged completion of the Works or termination or determination of the Contract under Condition Nos.55, 56 and 57 hereof.

Provided that in the event of abandonment of the Works or cancellation of the Contract under Conditions No.52, 53 or 54 hereof, such reference shall not take place until alternative arrangement have been finalised by the Government to get the Works completed by or through any other Contractor or Contractors or Agency or Agencies.

Provided always that commencement or continuance of any

arbitration proceeding hereunder or otherwise shall not in any manner militate against the Government's right of recovery from the contractor as provided in Condition 67 hereof."

11. The tender was floated in the year 01.04.2008. It is not disputed that there is a clause for arbitration. The work which was supposed to be completed on 06.12.2010 was finally completed on 15.10.2019. The object of the dispute due to late completion of work was proposed to be referred to arbitration as there was an existing arbitration clause that is Clause 70 of the General Conditions of the Contracts (GCC). Both the parties have failed to reach to a consensus in respect of a procedure for appointing the sole arbitrator by the neutral appointing authority. Although, the tender was floated in the year 01.04.2008, the dispute arose after completion of the contract work on 15.10.2019.

12. The learned counsel for the respondent has relied on the decision of a Coordinate Bench of this Court in the case of ***M/S Barpeta Agro Infra Vs. The Union of India and 2 others in Arb.P. No.51/2023***, wherein it was held and observed that:-

"12. In the case of TRF Limited (supra) the Hon'ble Supreme Court had to decide two issues, which were as follows-

"1. Whether once the person who was required to arbitrate upon the disputes arisen under the terms and conditions of

the contract becomes ineligible by operation of law, he would not be eligible to nominate a person as an arbitrator, i.e. whether the Managing Director of the respondent, who had become ineligible to act as an arbitrator subsequent to the Arbitration and Conciliation (Amendment) Act, 2015, could not have also nominated any other person as arbitrator?

2. Whether challenge to an appointment of arbitrator nominated by Managing Director, under could only be made before the Arbitral Tribunal or the same could be raised before the court in application preferred under Section 11(6) of the Act."

*13. The 3 Judges Bench of the Supreme Court in **TRF Limited (supra)** thus answered the issues by holding that by virtue of Section 12(5) of the 1996 Act, if any person, who falls under any of the categories specified in the 7th Schedule, shall be ineligible to be appointed as the Arbitrator, by operation of law. Secondly a person, ineligible to become an Arbitrator, cannot nominate another as an Arbitrator.*

14. Para 54 of the judgment of the Supreme Court in TRF Limited (supra) is reproduced herein below as follows-

"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."

24. As the earliest judgment of the Supreme Court on this issue after the 2015 amendment is **TRF Limited (supra)**, this Court holds that the making of the panel/appointment of the serving/retired officials of the Railways, as members of the Arbitral Tribunal, is hit by Section 12(5) and the 7th Schedule of the 1996 Act, as their neutrality are in question. When the General Manager, N.F. Railway himself cannot be made an Arbitrator in view of Section

12(5) and the 7th Schedule to the 1996 Act, the panel/appointment of serving/retired officials of the Railways as Arbitrators cannot be made by the said official.”

13. Reverting back to the instant case, as per the Clause 70 of the arbitration clause of the General Conditions of Contracts (GCC) of Border Road Organisation, the arbitration is to be referred to a sole arbitrator of an Engineer Officer to be appointed by the authority mentioned in the tender documents. In the light of the decision of this Court in ***M/S Barpeta Agro Infra (Supra)***, and in view of the consensus reached between the parties, the dispute and differences between the parties is referred to an Arbitral Tribunal by appointing a sole arbitrator from the panel notified by this court on 04.08.2023. With the consent of both the sides, Mr. Justice(Rtd) H. N. Sarma, Judge of Gauhati High Court is hereby appointed to act as the sole arbitrator, so as to enter into a reference with respect to the dispute between the parties.

14. Registry to obtain the consent of the learned sole arbitrator.

15. With the terms of the above observations, the arbitration petition stands disposed of.

No order as to costs.

Comparing Assistant

JUDGE