

In the High Court of Judicature at Madras

Dated: 10.10.2017

Coram

The Honourable **Dr.Justice ANITA SUMANTH**

Original Petition No.612 of 2017

M/s.Rahee Infratech Limited
Flat No.1C, First Floor,
4, Ho Chi Minh Sarani,
Kolkata – 700 071
rep. By its Authorised Signatory
Mr.Ravi Kumar Khaitan

.. Petitioner

-VS-

The Principal Chief Engineer,
Southern Railway, Park Town,
Chennai – 600 003.

.. Respondent

Prayer: Petition filed under Section 11(6) (A) & (C) of the Arbitration & Conciliation Act, 1996 read with Rule 2 for appointment of arbitrators to adjudicate on the dispute that has arisen between the petitioner and the respondent.

For Petitioner : Mr.P.Giridharan

For Respondent: Mr.P.T.Ramkumar

ORDER

This Original Petition is filed in terms of Section 11(6) of the Arbitration and Conciliation Act, 1996 (in short, 'Act') praying for the appointment of a sole arbitrator to adjudicate upon disputes that have arisen between the

parties in terms of clauses 63 and 64 of the General Conditions of Contract stipulated under purchase order No.W/503/PC/31/12627 dated 20.03.2013.

2. Heard Mr.P.Giridharan, learned counsel for the petitioner and Mr.P.T.Ramkumar, learned counsel for the respondent.

3. The facts in brief are as follows:

The respondent floated a tender bearing No.No.W/503/PC/31/OT/2012-13, for supply of Elastic Clip MK III with Flat Toe for 60 kg UIC/52kg rail section to drawing no.RDSO T.3701 with latest alteration as amended upto date - Quantity - 23,00,496 Nos. The petitioner, vide letter dated 21.09.2012 expressed its interest in participating in the tender that was accepted by the respondent vide Letter of Acceptance dated 18.02.2013. A contract was thereafter entered into between the parties on 20.03.2013 for supply of Elastic Rail Clips MK III pursuant to, and as per the terms and conditions of Tender No.W/503/PC/31/OT/2012-13.

4. Disputes arose between the parties in the execution of the contract and the arbitration clause was invoked by the petitioner vide letter dated 24.05.2016. The Railways, vide communication dated 06.06.2016, being an internal communication, a copy of which was addressed to the petitioner as well, directed the relevant branch of the Railways to take action on the request of the petitioner. Communications were exchanged inter se the parties.

5. While this was so, Circular No.2015/CE-I/CT/ARB/18 dated 16.11.2016 was issued by the Ministry of Railways, Government of India

circulating the revised clauses in relation to arbitration that took note of the amendments to the Arbitration and Conciliation Act vide Arbitration and Conciliation (Amendment) Act, 2015. The amended clause provided for waiver of the applicability of sub-section 12(5) of the Arbitration and Conciliation (Amendment) Act, 2015, and upon the contractor agreeing to such waiver to provide confirmation of the same in a specified format given in Annexure XII of the amended General Conditions of Contract. The request of the Railways was not acceded to by the petitioner, who vide letter dated 03.03.2017 rejected the same. Pursuant thereto, the Railways, vide letter dated 15.06.2017, proposed the appointment of Mr.S.Muralidaran, Retired Chief Signal & Telecom Engineer/Garden Reach/Kolkata, presently residing at Bangalore – 78 as the sole Arbitrator. The petitioner, however, by letter dated 26.07.2017 rejected the appointment of Mr.S.Muralidaran as the sole Arbitrator taking note of the position that the sole arbitrator nominated and appointed by the Railways is an officer retired from the Railways and expressing his apprehension that the proceedings for arbitration would not be conducted in a free and fair manner.

6. Learned counsel for the petitioner has placed reliance on a judgment of the Supreme Court in the case of *TRF Ltd. V. Energo Engineering Projects Ltd.* (Manu/SC/0755/2017).

7. The aforesaid case however appears to be distinguishable on facts as the issue framed in the first paragraph of the judgment is to the effect that the nomination of an Arbitrator by an individual, who was himself disentitled to carry the mandate of an Arbitrator would be equally unacceptable or contrary

to law. That, not being the issue involved in the present case, the present judgment is distinguishable on facts and does not advance the case of the petitioner.

8. It is in the light of the aforesaid facts, that the present petition has been filed seeking the appointment of an arbitrator by this Court.

9. Mr.P.T.Ramkumar, learned counsel appearing for the Railways would defend the appointment of Mr.S.Muralidaran stating that he was, in fact, from the South Eastern sector of the Railways and as such, was not part of the Southern Zone of the Railways. This being the case, he would contend that the apprehension expressed by the petitioner is wholly unfounded and has no basis.

10. He would place reliance on the decision of the Punjab and Haryana High Court in *Reliance Infrastructure Ltd. V. Haryana Power Generation Corporation Ltd.* (2017 (2) R.A.J. 480 (P&H)), which considers the appointment of a retired Chief Secretary as the sole Arbitrator and accepts the same. He would specifically refer to paragraph nos.17 to 22 of the decision. The discussion is to the effect that Item 1 of the V Schedule of the Act, which bars an employee/consultant/advisor or any one that has any other past or present business relationship to act as arbitrator would not be triggered by virtue of past employment. A distinction was made between an employee/consultant/advisor currently in service and a person with past or present business relationship with the party pointing out that the word 'past' does not cover the first limb of item 1 of the V Schedule. I respectfully agree.

Employment in the past, would not be an automatic ban. Thus, unless there is a specific instance or reason that is pointed out by the petitioner to support the allegation of absence of independence on the part of the sole Arbitrator, I see no reason to sustain the objection raised.

11. He would also place reliance on the judgment of the Supreme Court in the case of *Voestalpine Scienen GMBH V. Delhi Metro Rail Corporation Limited* ((2017) 4 SCC 665), wherein the Supreme Court holds as follows:

'26. It cannot be said that simply because the person is a retired officer who retired from the government or other statutory corporation or public sector undertaking and had no connection with DMRC (the party in dispute), he would be treated as ineligible to act as an arbitrator. Had this been the intention of the legislature, the Seventh Schedule would have covered such persons as well.'

12. Having heard the parties in detail, I am of the view that the objection raised by the petitioner to the appointment of Mr.S.Muralidaran as sole Arbitrator is, at best, pre-mature. The parties are entitled to invoke Section 12(5) read with the Seventh Schedule to raise an objection to assumption of jurisdiction by the arbitrator, supporting such apprehension with material to establish that the Arbitrator is either incapable of independence or impartiality. In the present case, the objection raised is solely on the ground that the individual had been an employee with South Eastern Railways in the past.

13. Even assuming for a minute that the Arbitrator was employed with the Southern Railways itself, I do not believe that the objection is to be accepted upon a mere allegation, except if there is material produced to

establish bias, or at least a strong likelihood thereof.

14. I thus reserve the right of the petitioner to raise its objection as a preliminary objection before the Arbitrator at the appropriate juncture and in accordance with law.

15. Accordingly, I confirm the appointment of Mr.S.Muralidaran, Retired Chief Signal & Telecom Engineer/Garden Reach/Kolkata, residing at Bangalore – 78 as sole Arbitrator to adjudicate upon disputes inter se the parties. He may, after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible, preferably within a period of six months from the date of receipt of the order.

16.The Original Petition is, accordingly, disposed of, leaving the parties to bear their own costs.

10.10.2017

Index: Yes/No

Speaking order/Non-speaking order

sl

Note: Issue order copy on or before 23.10.2017.

Dr.ANITA SUMANTH,J.

SI



Original Petition No.612 of 2017

WEB COPY

10.10.2017