

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

COMMERCIAL ARBITRATION APPLICATION NO.145 OF 2017

M/s.Kumar Urban Development Pvt. Ltd.)....Applicant

V/s.

The General Manager, Central Railways)....Respondent

Mr.Akash Rebello a/w Mr.Parag Sharma, Ms.Aditi Phatak, Ms.Samaea Umrigar and Mr.Murlidhar Kumar I/by Udwadia and Co. for the applicant.

Mr.T.J.Pandian for respondent.

CORAM : K.R.SHRIRAM,J

DATE : 23.10.2018

P.C.:-

1. The arbitration agreement can be found in clause-16 of the

Agreement to Develop dated 11.10.2002 which reads as under :-

“RESOLUTION OF DISPUTES :

In the event of any question, dispute or difference arising under these presents or in connection therewith (except to any matters the decision of which specifically provided by these presents or conditions of contract) the same shall be settled through arbitration under the Arbitration and Conciliation Act 1996 and the Rules there under and any modifications there of for the time being in force. The arbitrators will be appointed as per the procedure contained in said act out of the panel of arbitration maintained by the Railway. The award of the Arbitrators shall be final and binding on the parties.”

2. The panel of arbitrators maintained by Railway was not provided when the contract was entered into. After disputes arose, applicant filed a petition under Section 9 of the Arbitration & Conciliation Act, 1996.

3. On 24.2.2016 the said petition came to be disposed with the following order :-

“Heard learned senior Counsel for petitioner and respondent.

2) Learned counsel for the petitioner submits that at present they are pressing order in terms of prayer clause (b) only with liberty to take appropriate steps for remaining relief before Arbitrator under section 17 of Arbitration and Conciliation Act, 1996.

3) On the other hand, learned counsel appearing on behalf of respondent submits that they have no objection, if petition made absolute in terms of prayer clause (b). To that effect, he has given in writing on farad and same is taken on record and marked as article 'X' for the purpose of identification. Learned counsel for the respondent submits that they have no objection to appoint Arbitrator as per clause 16 agreement to develop dated 11/10/2002. Same is accepted.

4) Hence, by consent, without giving any reasons, petition stands disposed in terms of prayer clause (b) and statement made by learned counsel for respondent. Prayer clause (b) reads thus :

(b) That pending the commencement and culmination of the Arbitration proceedings and nomination of an Arbitrator and the pending and passing of the award, the Respondent be restrained by an order and injunction of this Hon'ble Court from encashing the Bank Guarantee bearing reference-(i) No. Bank Guarantee No.0896509 issued by the Petitioners on 18th February 2009 and valid till 17th February 2014 for an amount of Rs.1,06,17,750/- (Rs.One Crore Six Lakhs Seventeen Thousand Seven Hundred and Fifty only) was further extended to 17th February, 2015 and has now been extended for a further period upto 17th February 2016 as also the (ii) Bank Guarantee No.0896509BG0000033 issued by us on 13th January, 2009 and renewed till 12th January, 2014 for an amount of INR 3,18,53,250/- was further extended to 12 January 2015 and has now been extended for further period up to 12th January 2016 in respect of the 3rd, 4th and 5th installments given in pursuance of the agreement for development dated 11/10/2002 and extended from time to time”

5) Liberty granted to the petitioner to move before Arbitrator under section 17 of the Arbitration and Conciliation Act, 1996 for remaining prayers. Arbitrator to decide that application on its own merits.

6) All contentions of both parties are kept open.”

4. Subsequently, on 29.2.2016, respondent addressed the following letter to the applicant.

*CENTRAL RAILWAY
General Manager's office, CST, Mumbai-400 001*

No.G.191/Apptt/ARB/2015/Kumar Urban

REGISTERED A.D
Date : 29/02/2016

*M/s.Kumar Urban Development Pvt. Ltd.
(formerly known as Kumar Housing Corporation Ltd)
10th floor, Kumar Business Center,
CTS No.29, Bund Garden Road,
Behind Shangrila Garden,
Pune-411 001.*

Sub : Arbitration in the matter of dispute in regard to development and lease of approx. 5000 sqm.vacant land on Aga Khan Road at Pune for commercial purposes. Agreement to develop dt.11/10/2002.

Ref.: Order dated 24/02/2016 passed by the Hon'ble High Court, Bombay in Arbitration Petition No.1789/2016.

Pursuant to the Order dtd.24/02/2016 passed by the Hon'ble High Court, Bombay in the Arbitration Petition No.1789 of 2016, I am directed to send herewith a panel of the following officers nominated by the General Manager, Central Railway for appointment of your nominee Arbitrator.

PANEL

1.	Shri Sudhir Kumar	Retired Chief Commissioner of Railway Safety/Central Circle
2.	Shri S.V.Ingale	Retired Additional General Manager, Central Railway
3.	Shri A.K.Verma	Retired General Manager, South Eastern Railway
4.	Shri W.K.Pradhan	Retired Chief Mechanical Engineer, Central Railway

You are therefore requested to suggest upto 2 names from the above panel. So that the General Manager may appoint your nominee Arbitrator alongwith Railway's nominee arbitrator and Presiding Arbitrator to adjudicate the disputes/claims of the parties to the agreement.

This is for your kind information and necessary action please.

(Saket-Kumar Mishra)
Dy.General Manager's
for General Manager

Copy to : PCE-for information and necessary action please.”

5. Mr.Rebello for the applicant states that this letter is clearly contrary to the Judgment of the Apex Court in *Voestalpine Schienen GMBH vs. Delhi Metro Rail Corporation Limited*¹ and also contrary to the provisions of sub-section 5 of section 12 of the Arbitration & Conciliation Act, 1996. Mr.Rebello submits that not only respondent has recommended names of four retired railway officers but also states that the applicant shall select two out of the four names and the General Manager of respondent will nominate one out of the two as nominee arbitrator along with Railway's nominee arbitrator and Presiding Arbitrator to adjudicate the disputes/claims of the applicant.

6. Mr.Rebello states that this letter has been written even after railways being aware of the amendment to the Arbitration & Conciliation Act 1996, though he fairly concedes that this was before the judgment of the Apex Court in *Voestalpine Schienen GMBH (Supra)*.

7. I have decided the issue today in another similar matter in Commercial Arbitration Application No.135 of 2017.

8. Mr.Pandian agrees that four names suggested, retired three years ago, does not help. There is no cooling off period prescribed under the Arbitration & Conciliation Act, 1996. The fifth schedule lists

1. (2017) 4 SCC 665

situations that would disqualify a person from being an arbitrator. These are that gives rise to justifiable doubts to the independence or impartiality of arbitrators and includes arbitrator's relationship with the parties or counsel. Item-1 reads "The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.

9. In *Voestalpine Schienen GMBH (Supra)* paragraph nos.27, 28, 29 & 30 read as under :-

27. As already noted above, DMRC has now forwarded the list of all 31 persons on its panel thereby giving a very wide choice to the Petitioner to nominate its arbitrator. They are not the employees or ex-employees or in any way related to the DMRC. In any case, the persons who are ultimately picked up as arbitrators will have to disclose their interest in terms of amended provisions of Section 12 of the Act. We, therefore, do not find it to be a fit case for exercising our jurisdiction to appoint and constitute the arbitral tribunal.

28. Before we part with, we deem it necessary to make certain comments on the procedure contained in the arbitration agreement for constituting the Arbitral Tribunal. Even when there are a number of persons empanelled, discretion is with DMRC to pick five persons therefrom and forward their names to the other side which is to select one of these five persons as its nominee (though in this case, it is now done away with). Not only this, DMRC is also to nominate its arbitrator from the said list. Above all, the two arbitrators have also limited choice of picking upon the third arbitrator from the very same list i.e., from remaining three persons. This procedure has two adverse consequences. In the first place, the choice given to the opposite party is limited as it has to choose one out of the five names that are forwarded by the other side. There is no free choice to nominate a person out of the entire panel prepared by DMRC. Secondly, with the discretion given to DMRC to choose five persons, a room for suspicion is created in the mind of the other side that DMRC may have picked up its own favourites. Such a situation has to be countenanced. We are, therefore, of the opinion that sub-clauses (b) & (c) of Clause 9.2 of SCC need to be deleted and instead choice should be given to the parties to nominate any person from the entire panel of arbitrators. Likewise, the two arbitrators nominated by the parties should be given full freedom to

choose the third arbitrator from the whole panel.

29. Some comments are also needed on Clause 9.2(a) of GCC/SCC, as per which DMRC prepare the panel of “serving or retired engineers of government departments or public sector undertakings”. It is not understood as to why the panel has to be limited to the aforesaid category of persons. Keeping in view the spirit of the amended provision and in order to instil confidence in the mind of the other party, it is imperative that panel should be broadbased . Apart from serving or retired engineers of government departments and public sector undertakings, engineers of prominence and high repute from private sector should also be included. Likewise panel should comprise of persons with legal background like Judges and lawyers of repute as it is not necessary that all disputes that arise, would be of technical nature. There can be disputes involving purely or substantially legal issues, that too, complicated in nature. Likewise, some disputes may have the dimension of accountancy, etc. Therefore, it would also be appropriate to include persons from this field as well.

30. Time has come to send positive signals to the international business community, in order to create healthy arbitration environment and conducive arbitration culture in this country. Further, as highlighted by the Law Commission also in its report, duty becomes more onerous in government contracts, where one of the parties to the dispute is the Government or public sector undertaking itself and the authority to appoint the arbitrator rests with it. In the instant case also, though choice is given by DMRC to the opposite party but it is limited to choose an arbitrator frm the panel prepared by DMRC. It, therefore, becomes imperative to have a much broadbased panel, so that there is no misapprehension that principle of impartiality and independence would be discarded at any stage of the proceedings, specially at the stage of constitution of the Arbitral Tribunal. We, therefore, direct that DMRC shall prepare a broadbased panel on the aforesaid lines, within a period of two months from today.”

10. In my view, it is a fit case where the court should interfere and appoint a sole arbitrator. The arbitration clause does not require a panel of three arbitrators. It only states that arbitrator will be appointed as per the procedure contained in the said Act. It would also save cost if the matter is referred to sole arbitrator.

11. By consent, Dr. S. Radhakrishnan, J. (retired), former Judge of this court, residing at Flat No.B-6, Nyay Sagar Co-op Housing Society, Jagat Vidya Road, Kala Nagar, Bandra (East), Mumbai-400051, Mobile No.9920030650, Email : radhakrishnans11@gmail.com, is appointed as sole arbitrator to decide all disputes arising out of, in connection with and relating to Agreement to Develop dated 11.10.2002 including counter claim, if any. The fees, administrative expenses, typing charges, venue charges, if any, shall be shared equally between the parties and the same will be costs in the arbitral proceeding.

12. The arbitrator to make disclosure in writing as required under Section 11(8) read with 12(1) of the Arbitration & Conciliation Act, 1996, directly to the parties within two weeks of receiving communication from either party enclosing copy of this order.

Liberty to apply.

13. Application accordingly disposed.

(K.R.SHRIRAM,J)