

HIGH COURT OF CHHATTISGARH, BILASPUR**ARBR No. 9 of 2019**

- Angelique International Limited Having Its Registered Office At 104-107, Hemkunt Tower, 1st Floor, 98 Nehru Place, New Delhi - 110019

---- Applicant**Versus**

1. Union Of India Ministry Of Railways (Railway Board), Through Chairman Rail Bhawan, Raisina Road New Delhi 110001
2. South East Central Railway The General Manager, New Zonal Building Bilaspur Chhattisgarh. 495004
3. The Chief Electrical Engineer Electric Construction Department, SECR Head Office, Bilaspur Chhattisgarh. 495004

---- Respondents

For Applicant : Shri Rishabh Garg, Advocate

For Respondents No.1 & 2 : Shri Abhishek Sinha, Advocate

Hon'ble Shri Justice Goutam Bhaduri**Order On Board****11/09/2019**

1. Heard.
2. The present petition is for appointment of arbitrator under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (for short 'the Act, 1996').
3. The facts of this case are that the petitioner entered into an agreement with the railways on 26.04.2017. On the date of agreement with respect to the appointment of the arbitrator clause 64.3(a) (ii) which governed the appointment, for sake of brevity the said clause is reproduced hereunder:-

“64.(3) (a)(ii) -In cases not covered by the Clause 64(3)(a) (i), the Arbitral Tribunal shall consist of a Panel of three Gazetted Railway Officers not below JA Grade or 2 Railway Gazetted Indian Railways Standard General Conditions of Contract - July, 2013 As on 30th June 2013 Page 57 Officers not below JA Grade and a retired Railway Officer, retired not below the rank of SAG Officer, as the arbitrators. For this purpose, the Railway will send a panel of more than 3 names of Gazetted Railway Officers of one or more departments of the Railway which may also include the name(s) of retired Railway Officer(s) empanelled to work as Railway Arbitrator to the contractor within 60 days from the day when a written and valid demand for arbitration is received by the GM. Contractor will be asked to suggest to General Manager at least 2 names out of the panel for appointment as contractor's nominee within 30 days from the date of dispatch of the request by Railway. 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 or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the 3 arbitrators so appointed. GM shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contractor's nominees. 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 Railway for the purpose of appointment of arbitrator.”

4. It is contended on behalf of the petitioner that the said clause of appointment of the arbitrator as was existing in the agreement was hit by Section 12 (5) of the Act, 1996, which was inserted by the Act of amendment on 23.10.2015. It is stated that the amended act put a bar that if the arbitrator is connected with the parties, then in such case, he cannot arbitrate. It is further contended that subsequently, the respondent tried to unilaterally insert into clause 64. (3) (b) as per the letter dated 25.09.2018 invoking Section 12 (1) (b) of the Act, 1996 read with explanation clause. It is stated that this part also cannot be inserted unilaterally by the railways. It is further contended that the said clause even would not be made applicable since it would be against the ratio laid down

under Section 12 (5) of the Act, 1996 and ratio of the judgment passed by the Supreme Court in the case of ***Voestalpine Schienen GmbH Vs. Delhi Metro Rail Corporation Ltd., decided on 10.02.2017***, therefore, under the circumstances since the petitioner has raised the arbitration issue on 23.03.2018, arbitrator may be appointed in this case.

5. Per contra, learned counsel for the respondents/railways would submit that the petitioner was in know of the fact that the amended part is included in the agreement, which was in arbitration clause of general agreement earlier. It is stated that the letter dated 25.09.2018 was in know of the petitioner and this incorporation was impliedly inserted prior to signing of the agreement dated 26.04.2017, therefore, the petitioner is bound by the agreement. He would further submit that the declaration which has been filed will also show that the general conditions with the correction slips would be applicable and letter dated 25.09.2018 was filed within the correction slip. Consequently, the letter part of clause was accepted which was with respect to appointment of arbitrator as per amended Act of 2015.
6. I have heard learned counsel for the parties.
7. Perused the initial agreement. The arbitration clause which is applicable in this case of 64.3 (a) (ii). This agreement speaks of appointment of arbitrator of the railways. By virtue of amendment of Section 12 (5) of the Act, 1996 it mandates that notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator. Section 12 (5) of the Act, 1996 reads as under:-

“12. Grounds for challenge.—

(1) xxx xxx xxx

(2) xxx xxx xxx

(3) xxx xxx xxx

(4) xxx xxx xxx

(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.”

Likewise in the seventh schedule the clause 1 ineligible clause takes into sweep that when the arbitrator is an employee, consultant, advisor or has any other past or present relationship with a party, shall be ineligible to be appointed as an arbitrator.

8. Admittedly therefore in view of the bar created by amendment of Act in 2015 the clause 64.(3) (a) (ii) a condition under the original agreement cannot be invoked and pressed into motion. With respect to letter dated 25.09.2018 the submission is that it was already incorporated in general and correction slip as existing was applicable. The Clause 64 (3) (b) the said communication to the petitioner is on 25.09.2018 vide Annexure A-5, which was admittedly after the original agreement dated 26.04.2017 was entered. Therefore, the submission of the railways that it was earlier communicated and the petitioner was in know of the fact of the amendment is difficult to give a way. By such amendment clause 64 (3) (b), which falls in line to the Section 12 (1) (b) read with explanation which refers to the 5th schedule, it allows the arbitrator to be appointed, he may be the employee, if he has retired before a period of three years.

9. In this case, the parties to the dispute have not waved the applicability of this sub-section by an express agreement subsequent to the dispute. If the

amendment of arbitration already stand incorporated in the year 2016 according to the respondents/railways, then it also contradicts to the declaration form which is filed along with agreement which refers to General Condition of Contract of July, 2014 with up to date correction slips. Declaration also do not whisper about such change of terms of appointment of arbitrator in pursuance to clause 64.(3) (b). In view of this, the submission of the petitioner that clause 64.(3) (b) was sent to the petitioner by the communication dated 25.09.2018 cannot be unilaterally invoked and pressed into motion. In a result, since the original contract 64.(3) (a) (ii) cannot be already been being part has been created under Section 12 (5) and the facts of this case, the applicant having raised the dispute for appointment of arbitrator on 20.03.2018, I am inclined to allow this petition.

10. Accordingly, Hon'ble Shri Justice L. C. Bhadoo, a retired Judge of High Court of Chhattisgarh, is appointed to arbitrate the matter. Registry shall inform the Arbitrator about his appointment. The remuneration of the arbitrator shall be paid according to the Act, 1996 apart from the expenses.

11. With the aforesaid observation, the arbitration request stands disposed of.

Sd/-

Goutam Bhaduri
Judge