

Ashwini

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
COM ARBITRATION APPLICATION (L) NO. 503 OF 2019
IN
COMM ARBITRATION PETITION (L) NO. 1454 OF 2019**

Bulls Eye Media Pvt Ltd

...Applicant

Versus

Central Railway

...Respondent

Mr Joaquim Reis, Senior Advocate, with Dhananjay B Deshmukh,
for the Applicant.

Mr TJ Pandian, for the Respondent.

CORAM: G.S. PATEL, J.

DATED: 11th December 2019

PC:-

1. The Commercial Arbitration Petition and the Commercial Arbitration Application are filed by an entity that had an advertising display agreement with the Central Railway. The Central Railway issued a tender for advertising displays on certain railway coaches of specific trains. The tenders specified a five-year term. The Central Railway accepted the Applicant's bid. The Applicant was to pay Rs.78,31,139/- per month for a period of five years with a 10% escalation. There were also provisions for a security deposit.

2. Details about an extension of time to submit the necessary bank guarantee are not relevant at this stage. There was in October 2018 a request from the Applicant to adjust a balance amount of Rs 53 lakhs from the Earnest Money Deposit. A bank guarantee for Rs. 4,69,86,830/- was further delayed and a partial guarantee of only Rs.2.35 crores was submitted with an undertaking to furnish a bank guarantee for the remaining amount later. On 28th December 2018 a bank guarantee for Rs. 1.65 crores was furnished. There was yet a balance about of Rs.69,86,830/-.

3. The Applicant could not commence the advertising displays without a display authority letter and Central Railway said it would issue this only once it had received full security.

4. A copy of the agreement dated 8th February 2019 that was finally executed between the parties is at Exhibit 'L' to the application at pages 91 to 105.

5. It seems that the Respondents issued a show cause notice on 4th February 2019 claiming a balance amount of Rs.2,72,58,429/- comprising license fees, GST, interest for delayed payment at 12% p.a. and so on. The Applicant replied to the show-cause notice on 13th February 2019. The Respondents sent a further demand on 9th May 2019 in the amount Rs.4,42,84,575/-. This correspondence continued and the Applicant has been requesting that the period of license fees be adjusted or re- computed.

6. According the Respondent, represented by Mr Pandian, there are unpaid dues and these now as of 14th November 2019 are in amount of Rs.4,38,73,073/-. The Respondent issued a show cause notice to the Applicant on that date.

7. The agreement in question contains in clause 16 a comprehensive provision for arbitration which reads thus:

“16. Disputes/Arbitration:—

1. Jurisdiction: Arbitration:

(i) In the event of any dispute or difference between the parties hereto as to the respective rights and liabilities of the parties on any matter in question shall demand in writing that the dispute or difference be referred to Arbitration.

(ii) (a): The demand by either party for arbitration shall specify the matters which are in question, or subject of the dispute or difference as also the amount of claim item-wise. Only such dispute or difference, in respect of which the demand has been made, together with counter claims or set off, given by the other Party, shall be referred to arbitration and other matters shall not be included in the reference.

(ii) (b): The parties may waive off the applicability of sub-section 12(5) of Arbitration and Conciliation (Amendment) Act 2015, if they agree for such waiver, in writing, after dispute having arisen between them, in the format given below of these conditions.

(iii) (a): The Arbitration proceedings shall be assumed to have commenced from the day, a written and valid demand for arbitration is received by the Railway.

(iii) (b): The claimant shall submit his claim stating the facts supporting the claims along with all the relevant documents and the relief or remedy sought against each claim within a period of 30 days from the date of appointment of the Arbitral Tribunal.

(iii) (c): The Respondent shall submit its defence statement and counter claim (s), if any, within a period of 60 days of receipt of copy of claims from Sole Arbitrator/Tribunal thereafter, unless otherwise extension has been granted by Sole Arbitrator/Tribunal.

(iii)(d): Place of Arbitration: The place of arbitration would be within the geographical limits of the Division of the Railway where the cause of action arose or any other place with the written consent of both the parties.

(iv): No new claim shall be added during proceedings by either party. However, a party may amend or supplement the original claim or defence thereof during the course of arbitration proceedings subject to acceptance by Tribunal having due regard to the delay in making it.

2. Obligation During Pendency of Arbitration: Work under the contract shall, unless otherwise directed by the Railway Administration, continue during the arbitration proceedings, and no payment due or payable by the either parties shall be withheld on account of such proceedings, provided, however, it shall be open for Arbitral Tribunal/Sole Arbitrator (as the case may be) to consider and decide at the preliminary stage of arbitration proceedings, whether or not such work should continue during arbitration proceedings.

3. Appointment of Arbitrator:

(a): Appointment of Arbitrator where applicability of section 12 (5) of Arbitration and Conciliation Act has been waived off:

(a) (i): In cases where the total value of all claims in question added together does not exceed Rs. 1,00,00,000/- (Rs. One Crore only), the Arbitral Tribunal shall consist of a Sole Arbitrator who shall be a Gazetted Officer of Railway not below JA Grade, nominated by the General manager. The sole arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by the General Manager.

(a) (ii): In cases not covered by the Clause 3(a) (i), the Arbitral Tribunal shall consist of a panel of three Gazetted Railway Officers not below JA Grade or 2 Railway Gazetted 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 at least four (4) 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 General Manager.

Licensees will be asked to suggest to the General Manager at least 2 names out of the panel for appointment as Licensee'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 Licensee'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 among-st the 3 arbitrators so appointed. The General Manager 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 5A grade of other departments of the Railway for the purpose of appointment of arbitrator.

3 (b): Appointment of Arbitrator where applicability of section 5 of A&C Act has not been waived off: The Arbitral Tribunal shall consist of a panel of three (3) retired Railway Officer, retired not below the rank of SAG officer, as the arbitrators. For this purpose, the Railway will send a panel of at least four (4) names of retired Railway Officer(s) empaneled to work as Railway Arbitrator duly indicating their retirement date to the Licensee within 60 days from the day when a written and valid demand for arbitration is received by the General Manager.

The Licensee will be asked to suggest to the 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 Licensees 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. General manager shall complete this exercise of appointing the Arbitral within 30 days from the receipt of the names of Licensee's nominees. While nominating the arbitrators, it will be

necessary to ensure that one of them has served in the Accounts Department.

3 (c) (i): If one or more of the arbitrators appointed as above refuses to act as arbitrator, withdraws from his office as arbitrator, or vacates his/their office/offices or is/ are unable or unwilling to perform his functions as arbitrator for any reason whatsoever or dies or in the opinion of the General manager fails to act without undue delay, the General manager shall appoint new arbitrator/arbitrators to act in his/their place in the same manner in which the earlier arbitrator/arbitrators had been appointed. Such re-constituted Tribunal may, at its discretion, proceed with the reference from the stage at which it was left by the previous arbitrator (s).

3 (c) (ii): The Arbitral Tribunal shall have power to call for such evidence by way of affidavits or otherwise as the Arbitral Tribunal shall think proper, and it shall be the duty of the parties hereto to do or cause to be done all such things as may be necessary to enable the Arbitral Tribunal to make the award without any delay. The proceedings shall normally be conducted on the basis of documents and written statements.

(a) Before proceeding into the merits of any dispute, the Arbitral Tribunal shall first decide and pass its orders over any plea submitted/objections raised by any party, if any, regarding appointment of Arbitral Tribunal, validity of arbitration agreement, jurisdiction and scope of the Tribunal to deal with the dispute (s) submitted to arbitration, applicability of time 'limitation' to any dispute, any violation of agreed procedure regarding conduct of the arbitral proceedings or plea for interim measures of protection and record its orders of day to day proceedings.

A copy of the proceedings duly signed by all the members of tribunal should be provided to both the parties.

3 (c) (iii) (i): Qualification of Arbitrator (s)

- (a) Serving Gazetted Railway Officers of not below JA Grade level.
- (b) Retired Railway Officers not below 5A Grade level, three years after his date of retirement.
- (c) Age of arbitrator at the time of appointment shall be below 70 years.
 - (i) An arbitrator may be appointed notwithstanding the total number of arbitration cases in which he has been appointed in the past.
 - (ii) While appointing arbitrator (s) under Sub-Clause 12.3 (a) (I), 12.3 (a) (ii), 12.3 (b) above, due care shall be taken that he/they is/are not the one. Those who had an opportunity to deal with the matters to which the contract relates or who in the course of his/their duties as Railway servant (s) expressed views on all or any of the matters under dispute or differences. The proceedings of the Arbitral Tribunal or the award made by such Tribunal will, however, not be invalid merely for the reason that one or more arbitrator had, in the course of his service, opportunity to deal with the matters to which the contract relates or who in the course of his/their duties expressed views on all or any of the matters under dispute.

3 (d) (i): The arbitral award shall state item wise, the sum and reasons upon which it is based. The analysis and reasons shall be detailed enough so that the award could be inferred there from.

3 (d) (ii): A party may apply for corrections of any computational errors, any typographical or clerical errors or any other error of similar nature occurring in the award of a Tribunal and interpretation of a specific point of award to Tribunal within 60 days of receipt of the award.

3 (d) (iii): A party may apply to Tribunal within 60 days of receipt of award to make an additional award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

4: In case of the Tribunal, comprising of three Members, any ruling on award shall be made by a majority of Members of tribunal. In the absence of such a majority, the views of the Presiding Arbitrator shall prevail.

5: Where the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made.

6: i: The cost of arbitration shall be borne by the respective parties. The cost shall *inter alia* include fee of the arbitrator (s), as per the rates fixed by Railway Board from time to time and the fee shall be borne equally by both the parties, provided parties sign an agreement in the format given at Annexure-I to these condition after/while referring these disputes to Arbitration. Further, the fee payable to the arbitrator(s) would be governed by the instructions issued on the subject by Railway Board from time to time irrespective of the fact whether the arbitrator(s) is/are appointed by the Railway Administration or by the court of

law unless specifically directed by Hon'ble Court otherwise on the matter.

- ii. Sole Arbitrator shall be entitled for 25% extra fee over the fee prescribed by Railway Board from time to time.
- iii. Arbitrator tribunal shall be entitled to 50% extra fee if Award is decided within six months.

7: Subject to the provisions of the aforesaid Arbitration and Conciliation Act 1996 and the rules there under and any statutory modifications thereof shall apply to the appointment of arbitrators and arbitration proceedings under this Clause.

8: In case of any dispute, any suit, petition, reference or other filing shall be subject to exclusive jurisdiction of the Court at Mumbai city of India.”

(Emphasis added)

8. I have reproduced this because, apart from any thing else, sub-clauses 3(a) and 3(b) and their subsidiary clauses are obviously no longer sustainable in law in view of the decisions of the Supreme Court in *Perkins Eastman Architect DPC & Anr v HSSC (India) Ltd*,¹ *Voestalpine Schienen GmbH v Delhi Metro Rail Corporation Ltd*² and *TRF Ltd v Energo Engineering Products Ltd*.³ I had occasion to consider these recently in an order dated 4th December 2019 in *Lite Bite Foods Pvt ltd v Airports Authority of India*.⁴ The Supreme Court has held a provision of this kind for a unilateral appointment with a

1 2019 (9) SCC OnLine SC 1517.

2 (2017) 4 SCC 665.

3 (2017) 8 SCC 377.

4 Commercial Arbitration Application (L) No. 495 of 2019.

limited choice available to the opponent (and to the two nominee arbitrators) is not contemplated by the Arbitration Act as amended in 2015, and the Court can — and indeed must — exercise its power under Section 11(6) to effect an appropriate appointment.

9. Mr Pandian has taken instructions and these are to leave the choice of arbitrator to the court. Both sides agree that the court may nominate a learned counsel of this Court subject to his availability I would request Mr Cyrus Ardeshir to act as arbitrator to decide the disputes and differences between the parties arising from the agreement dated 8th February 2019.

(a) **Appointment of Arbitrator:** By consent, Mr Cyrus Ardeshir, learned Advocate of this Court, is hereby nominated to act as a Sole Arbitrator to decide the disputes and differences between the parties.

(b) **Communication to Arbitrator of this order:**

(i) A copy of this order will be communicated to the learned Sole Arbitrator by the Advocates for the Applicant within one week from today of the order being uploaded.

(ii) In addition, within one week of this order being uploaded, the Registry will forward an ordinary copy of this order to the learned Sole Arbitrator at the following postal and email addresses:

Arbitrator Mr Cyrus Ardeshir, Advocate

<i>Address</i>	Office No. 217, 2nd Floor, Vardhaman Chambers, Cawasji Patel Street, Fort, Mumbai 400 001
<i>Mobile</i>	9820097671
<i>Email</i>	cardeshir@gmail.com

- (c) **Disclosure:** The learned Sole Arbitrator is requested to forward his statement of disclosure under Section 11(8) read with Section 12(1) of the Arbitration Act to the Prothonotary & Senior Master of this Court, referencing this arbitration application, as soon as possible, and in any case sufficiently in advance of his entering upon the reference to his arbitration. That statement will be retained by the Prothonotary & Senior Master on the file of this application. Copies will be given to both sides.
- (d) **Appearance before the Arbitrator:** Parties will appear before the learned Sole Arbitrator on such date and at such place as he nominates to obtain appropriate directions in regard to fixing a schedule for completing pleadings, etc.
- (e) **Contact/communication information of the parties:** Contact and communication particulars are to be provided by both sides to the learned Sole Arbitrator within one week of this order being uploaded. The information is to include a valid and functional email address.

- (f) **Section 16 application:** The Respondent is at liberty to raise all questions of jurisdiction within the meaning of section 16 of the Arbitration Act. All contentions are left open.
- (g) **Interim Application/s:**
 - (i) The present Petition under Section 9 of the Arbitration Act will be treated, heard, and disposed of as an application under Section 17 of the Act. All affidavits filed in the Section 9 petition will be treated as affidavits filed in the Section 17 application. Liberty to apply to the learned Sole Arbitrator for leave to file further affidavits.
 - (ii) Liberty to both sides to make further interim applications including (but not limited to) interim applications under Section 17 of the Arbitration & Conciliation Act, 1996 before the learned Sole Arbitrator.
 - (iii) Any such application will be decided in such manner and within such time as the learned Sole Arbitrator deems fit.
- (h) **Fees:** The arbitral tribunal's fees shall be governed by the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018. Since this is an order made under Section 11(6), this Schedule will prevail over any contractual stipulation in the arbitration agreement.

- (i) **Sharing of costs and fees:** Parties agree that all arbitral costs and the fees of the arbitrator will be borne by the two sides in equal shares in the first instance.
- (j) **Consent to an extension if thought necessary.** Parties immediately consent to a further extension of up to six months to complete the arbitration should the learned Sole Arbitrator find it necessary.
- (k) **Venue and seat of arbitration:** Parties agree that the venue and seat of the arbitration will be in Mumbai as provided in the Agreement.

10. As to the relief sought in the Section 9 petition, prayers (a), (b), (c), (d) and (e) read:

“a. That this Hon’ble Court be pleased to issue a mandatory injunction to the Respondent thereby injuncting them from acting on the letter dated 14.11.2019 issued to the Applicant.

b. That this Hon’ble Court be pleased to restrain the Respondent from taking any coercive action in furtherance of the notice dated 14.11.2019.

c. That this Hon’ble Court be pleased to appointment a Sole Arbitrator to adjudicate all disputes between the Applicant and Respondent with respect of LOA dated 05.09.2018

d. That pending hearing and final disposal of this Application this Hon’ble Court be pleased to direct the Respondents to maintain status quo with respect to the said LOA dated 05.09.2018

e. That pending hearing and final disposal of this application this Hon'ble Court be pleased to restrain the Respondent from awarding the contract work to any third party."

11. I do not believe that there is any question of granting a mandatory injunction of the kind referred to in prayer clause (a) or ordering a status quo or restraining a Respondent from awarding the contract work to any other party. As regards prayer clause (b), the apprehension expressed by counsel for the Applicant is that the Central Railway will commence coercive recovery proceedings. I do not think there is any basis for that apprehension, at least not of any immediate threat. There are after all some guarantees that are available with the railways. Today we are at stage of the show cause notice of 14th November 2019. The Applicant will undoubtedly have to respond to that show cause notice and thereafter the issuing authority will necessarily have to decide that show cause notice. Any other claims or damages etc. on both sides can well be left to determination in arbitration and parties can be left to make such interim application before the learned sole arbitrator as they think necessary.

12. In any event, it is agreed that the Section 9 petition will be decided as a Section 17 application in arbitration.

13. Hence no immediate reliefs in the Section 9 petition.

14. This is not to be construed as a rejection on merits of the application. All contentions are left open for being canvassed before the learned sole arbitrator.

15. The application and petition are disposed of in these terms.

(G. S. PATEL, J)