

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

MISC. CIVIL APPLICATION (ARBN) NO. 519 OF 2019

M/s. V.K. Tiwari,
Contractors & Engineers, having its
Office at 265, Gandhi Nagar, Nagpur
through its Managing Partner
Shri Vimal Kumar s/o Kailashchandra
Tiwari, aged about 68 years,
Occupation – Business,
R/o Flat No.901, Court Royal, Khare
Town, Dharampeth, Nagpur-440010.

.... **APPLICANT**

VERSUS

1) Union of India,
through the General Manager South-
East, Central Railway, Bilaspur
(Chattisgarh)

2) Deputy General Manager,
Office of General Manager, S.E.C.R.,
Bilaspur.

.... **RESPONDENTS**

Mr. A.R. Wagh, Counsel for the applicant,
Mr. Prafulla S. Khubalkar, Counsel for the non-applicant 1.

CORAM : ROHIT B. DEO, J.

DATE OF RESERVING THE JUDGMENT : **16th DECEMBER, 2020**
DATE OF PRONOUNCING THE JUDGMENT : **22nd DECEMBER, 2020**

JUDGMENT :

The applicant is seeking appointment of arbitrator.

2. The applicant is a Contractor who was entrusted with certain work vide contract dated 25-8-2015, the scope of which was Construction of Limited Height Subway in lieu of manned level crossing No.41 in between Bhandara Khat Stations of Durg-Nagpur Main Line under jurisdiction of ADBEn/Tumsar Road (By pushing Method) vide C.A. No.17/BG/Sr. DEN/C/NGP dated 25-8-2015.

3. The applicant avers that since certain disputes arise, attributable to defaults committed by the non-applicants herein, he lodged certain claims and sought arbitration vide communication 03-5-2018. It is then averred that the non-applicants responded vide letter dated 31-5-2018 seeking consent for waiver of the rigours of Section 12(5) of the Arbitration and Conciliation Act, as amended. The applicant avers that vide letter dated 08-6-2018 he expressed unwillingness to consent to waiver. The next averment is that the non-applicants issued letter dated 14-6-2018 regarding modification of Clause 64 and that the conduct of the non-applicants indicates unwillingness to take recourse to the arbitral clause in the agreement.

4. The non-applicants have filed affidavit-in-response. A preliminary objection is raised to the prayer seeking appointment of arbitrator on the ground that the dispute is non-arbitrable and is an excepted matter in view of the signing and submission of the No Claim Certificate. The non-applicants aver that in view of Clause 43(2) of the Indian Railways Standard General Conditions of Contract (GCC), a contractor is not entitled to raise any claim after the signing of No Claim Certificate. The contractor signed the No Claim Certificates and Final Clearance Certificate on 20-6-2018. It is then averred that the applicant requested for releasing the security deposit, which request is accepted and the security deposit released. It is submitted that in view of the issuance of No Claim Certificate, Clause 63 of the GCC is attracted and the matter is covered by the “excepted matters” category.

5. The averments in the affidavit-in-response are not rebutted by the applicant by filing a counter affidavit. It would be necessary to refer to certain provisions of the GCC, which irrefutably is a part of the contract, in order to test the substance of the preliminary objection that the dispute is non-arbitrable.

Clause 63 reads thus :

“63. Matters finally determined by the Railway – All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of

the work or after its completion and whether before or after the determination of the contract shall be referred by the contractor to the Railway and the Railway shall within 120 days after receipt of the Contractor's representation make and notify decisions on all matters referred to by the contractor in writing provided that matters for which provision has been made in clauses 8, 18, 22(5), 39, 43(2), 45(a), 55, 55-A(5), 57, 57A, 61(1), 61(2) and 62(1) to (xiii)(B) of General Conditions of Contract or in any clause of the special conditions of the contract shall be deemed as 'excepted matters, and decisions of the Railway authority, thereon shall be final and binding on the contractor provided further that 'excepted matters' shall stand specifically excluded from the purview of the arbitration clause and not be referred to arbitration."

It would now be necessary to refer to Clause 43, which reads thus :

"43(1) Monthly Statement of Claims – *The Contractor shall prepare and furnish to the Engineer once in every month an account giving full and detailed particulars of all claims for any additional expenses to which the Contractor may consider himself entitled to and of all extra or additional works ordered by the Engineers which he has executed during the preceding month and no claim for payment for and such work will be considered which has not been included in such particulars.*

(2) Signing of "No Claim" Certificate – *The Contractor shall not be entitled to make any claim whatsoever against the Railway under or by virtue of or arising out of this contract, nor shall the Railway entertain or consider any such claim, if made by the Contractor, after he shall have signed a "No Claim" Certificate in favour of the Railway in such form as shall be required by the Railway after the works are finally measured up. The Contractor shall be debarred from disputing the correctness of the items covered by "No Claim" Certificate or demanding a clearance to arbitration in respect thereof."*

6. Conjoint reading of Clause 43(2) and Clause 63 would reveal that after the contractor signs "No Claim" Certificate after the final

measurement, the contractor shall be debarred from disputing the correctness of the items covered by No Claim Certificate or demanding a clearance to arbitration in respect thereof. In such a situation, the claim is treated as an excepted matter and, therefore, non-arbitrable.

7. Nothing is brought to my notice to hold that the dispute pertains to items which are not covered by the No Claim Certificate. In this view of the matter, I decline to appoint an arbitrator, as prayed, since the dispute is non-arbitrable.

8. The application is rejected.

JUDGE

adgokar