

THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
15~07~2020	27-07~2020

CORAM:

THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR

O.P.Nos.285 and 516 of 2019

M/s. Excel Engineering Enterprises,
Rep.by Proprietor
Kumaresan
No.63, Tamaraikulam , Elagiri Post,
Jolarpettai,
Vellore District – 635853

.. Petitioner
[in both Petitions]

.Vs.

1. The General Manager
Southern Railway,
Park Town, Chennai 600003.

2. The Deputy Chief Engineer/II/Construction,
Southern Railway Administration,
Egmore, Chennai 600008.

.. Respondents
[in O.P.No.285/2019]

1. The General Manager
Southern Railway,
Park Town, Chennai 600003.

2. The Chief Engineer, (MTP Project)
Southern Railway, Chennai 600008
3. The Deputy Chief Engineer(Construction),
Southern Railway Administration,
Mylapore, Chennai 600004.

.. Respondents
[in O.P.No.516/2019]

Prayer in O.P.No.285 of 2019: Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 to appoint a sole Arbitrator to adjudicate on the disputes that have been arisen between the Petitioner and the Respondents in Agreement No.23 dated 25.04.2017 and detailed in the letter of request for arbitration dated 25.10.2018 with costs.

Prayer in O.P.No.516 of 2019: Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 to appoint a sole Arbitrator to adjudicate on the disputes that have been arisen between the Petitioner and the Respondents in Agreement No.MTMY/MTP/DY CE/05-16 dated 02.02.2017.

For Petitioner : Mr. V. Srikanth
[in both Petitions]

For Respondents : Mr. P.T. Ramkumar
[in both Petitions] Standing Counsel for
Southern Railways

COMMON ORDER

These Original Petitions have been filed to appoint a sole Arbitrator to

adjudicate on the disputes that have been arisen between the Petitioner and the Respondents in Agreement No.23 dated 25.04.2017 and Agreement No.MTMY/MTP/DY CE/05-16 dated 02.02.2017 respectively.

2. It is the case of the Petitioner in O.P.No.285 of 2019 that he was awarded the construction of road under bridge with RCC Box of internal dimension of 11.40m * 5.50m Square alignment in lieu of LC No.81 at Km197/36-198/8 near Vaniyambadi Yard by Box Pushing method. Agreement was executed on 25.04.2017 for the work value of Rs.6,92,10,176/- The period of completion of the work was fixed at ten months. During the currency of the contract, the site was not handed over to the petitioner. The work involved construction of subway in lieu of level crossing. The level crossing was closed only during September 2017, whereas the contract itself expired by 30.8.2017. Excavation work commenced on 18.1.2018; during the course of excavation, there was heavy seepage of water and the water had to be bailed out frequently. The Petitioner had addressed letter dated 26.06.2018 to the respondents but no reply was received. On 27.7.2018 joint inspection was conducted by the Collector of Vellore along with Municipal Engineer and Railway Engineer; even then no action was initiated for the diversion

of the open drain. Hence the petitioner addressed letter dated 9.9.2018 to the Chief Engineer construction, to foreclose the agreement. Again by letter dated 23.10.2018 the petitioner requested for withdrawal of the 7 days notice issued to him. But no reply was ever received by the petitioner to the above communications. Finally, the Petitioner on 25.10.2018 addressed to the 1st Respondent sought appointment of arbitrator to resolve the dispute. The Respondents instead of appointing Arbitrator, through their letter dated 13.11.2018 sought for a declaration by the Petitioner to waive off applicability of Sections 12(5) and 31-A(5) of the amended Arbitration and Conciliation Act, 1996. The Petitioner expressed their unwillingness to waive the statutory protection by letter dated 21.11.2018. Therefore it is the contention that an independent Arbitrator has to be appointed.

3. It is the case of the Petitioner in O.P.No.516 of 2019 that he was the successful tenderer for the execution of the work viz., “Chennai Beach – Korukupet Section – Laying of 3rd and 4th lines between Chennai Beach and Korukkupet Stations – Earth work in cutting, Forming bank, Blanketing, Regarding Construction of Platforms, Transportation of Permanent way materials, Transportation of debris, Construction of Service building, Platform shelter, compound wall, drain,

dismantling of existing buildings and existing compound wall and other allied works. Letter of Acceptance was signed on 20.09.2016 for the work value of Rs.6,68,73,958/-. The period of completion of the work was fixed at nine months. As the clearance work spilled over into the Petitioner's schedule and the Petitioner was not given the required site for execution of the tendered work, the Petitioner requested for extension of time to complete the work. Despite extension of time, the Respondents could not provide site for execution of the tendered work. As the dispute arose between the parties, the Petitioner by letter dated 29.01.2019 addressed to the 1st Respondent sought appointment of Arbitrator to resolve the disputes. The Respondents instead of appointing Arbitrator, through their letter dated 13.02.2019 sought for a declaration by the Petitioner to waive off applicability of Sections 12(5) and 31(5) of the amended Arbitration and Conciliation Act, 1996. The Petitioner expressed their unwillingness to waive the statutory protection by letter dated 26.06.2019. Therefore it is the contention that a independent Arbitrator has to be appointed.

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4.The Respondents in O.P.No.285 of 2019 admitting the contract and allotment offer. It is their contention that the Petitioner did not take adequate steps

to execute the work and show sufficient progress. Seven day notice as per the contract was also issued on 17.10.2018. There again 48 hours notice was issued on 31.10.2018 in terms of Clause 62 of General Conditions of Contract. As the Petitioner did not take effective steps to proceed the work, the contract was terminated on 05.11.2018. After termination of contract, the petitioner raised certain disputes and sent a request dated 25.10.2018 for appointment of Arbitrator as per the relevant clauses of the General Conditions of Contract (GCC). As per Clause 51 of the agreement executed between the parties, the settlement of dispute in connection with the contract will be dealt with and governed by Clause 63 & 64 of General Conditions of Contract. As per Clause 64(3)(a)(ii) of GCC Arbitral Tribunal shall consist panel of three officers retired not below the rank of SAG officer, as the Arbitrators. The Respondents also sent names within 60 days from the day when a written and valid demand for arbitration was received by the GM. After receipt of the request from the Petitioner, the Respondents sent letter to the Petitioner for waiver of Section 12(5) of the Amended Arbitration and Conciliation Act, 2015. As the Petitioner has not accepted for waiver of applicability of Section 12(5) of Arbitration and Conciliation Act, 2015, the Respondents sent list of four Retired Railway Officers on 26.12.2018 and requested to select any two persons as

their choice and intimate 30 days for constitution of Arbitral Tribunal. Without choosing any of them the present Petition has been filed. Hence, it is the contention that Section 12(5) of the Amended Act restricts only an employee from being appointed as an Arbitrator. There is no bar for ex-employee being appointed as Arbitrator either in V or VII Schedule of Sec.12(5) of the Amended Act. Hence prayed for dismissal of application.

5. The Respondents in O.P.No.516 of 2019 not disputed the contract and agreement entered between the parties. It is their contention that the Petitioner did not did not adhere to the programme of work and could not complete the work within the time stipulated. Considering the request of the Petitioner dated 15.06.2017 the currency of contract was extended upto 31.12.2017. thereafter it was again extended upto 21.12.2018. Even after expiry of more than two years, the Petitioner did not complete the work. Without any intimation to the Respondents, the Petitioner abandoned the site site of work since 12.01.2019. The Petitioner sent a representation dated 29.01.2019 to the General Manager, Southern Railway requesting to appoint arbitrators as per the relevant clauses of GCC. On receipt of request for Arbitration, by letter dated 13.02.2019 and 25.02.2019, the petitioner

was advised to express their consent for waiver of Section 12(5) of the Amended Arbitration Act. But the Petitioner have not agreed for waiver of applicability of Section 12(5) of the Arbitration As per Clause 64(3)(b) of GCC, a panel of four Retired Railway Officers was sent to the Petitioner on 26.4.2019 and requested to tselst any two persons as their coise and intimate within 30 days. By letter dated 29.05.2019 and 26.06.2019 the Petitioner was reminded again to select two persons from the panel. But the Petitioner without expressing their choice of officers from the panel, filed the present original petition seeking appointment of independent arbitrator which is premature and liable to be dismissed.

6. Learned counsel appearing for the Petitioner in both petitions submitted that Clause 5 of Section 12 of the Amended Act makes it very clear that the retired employee become ineligible to be appointed as Arbitrator. The contract itself is of the year 2017 after the Amended Act. Hence it is his contention that modified GCC cannot be applied here. Further, the Petitioner also sent a letter and expressed his intention not to waive Section 12(5) conditions. Once he has not waived the retired employee cannot be appointed. Therefore, it is his contention that the contention of the Railways cannot be countenanced. In support of his contention he relied upon

the following judgments:

1. Perkins Eastman Architects DPC and Ors. vs. HSCC (India) Ltd. [AIR 2020 SC 59]

2. TRF Ltd., vs. Energo Engineering products Ltd., [AIR 2017 SC 3889]

7. Whereas the learned counsel appearing for the Respondents in both applications submitted that as the Petitioner has not waived Section 12(5), the Arbitrators have to be appointed only as per the GCC. Merely because the retired employees it cannot be said that they have any connection to the Respondents. In this aspect the Apex Court has clearly discussed the entire matter and the larger bench of the Apex Court has held that from the contract provides for appointment of Arbitrators in particular manner, independent Arbitrators cannot be appointed. In support of his submissions he relied upon the following Judgments:

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1. Central Organisation for Railway Electrification vs. ECI-SPIC-SMO-MCML (JV) [2019 SCC Online SC 1635]

*2.Tigmanshu Dhulia Films Pvt.Ltd. [2019 (5)
R.A.J.291 (Del)*

*3.Golden Infracon Pvt. Ltd. vs. State Infrastructure
& Industrial Development Corporation of Uttarkhand
Ltd., [2018 (1) R.A.J.689 (Utt.)*

*4. Government of Haryana PWD Haryana (B and
R) Branch v. G.F.Toll Road Private Ltd [(2019) 3 SCC
505]*

*5. Offshore Infrastructure Ltd., vs. Bharat Heavy
Electricals Ltd., [2017 (6) CTC 301]*

*6. M/s.JV Engineering Associate vs. General
Manager [O.P.No.446 to 449 of 2019 dated 10.02.2020]*

8. It is not in dispute that both parties are governed by the contract which contain Arbitration Clause. Clause 64 (3) (a) (ii) of General Conditions of Contract is as follows:

"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 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 to the contractor who will be asked to suggest to the General Manager upto 2 names out of the panel for appointment as the Contractor's nominee. 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. 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. "

9. Further it is also not in dispute Clause 64 (3)(b) of GCC has modified by notification dated 11.11.2016. Modified Clause 64(3)(b) of GCC deals with appointment of Arbitrator, which is as follows:

"64. (3)(b) Appointment of Arbitrator where applicability of Section 12(5) of A&C Act has not been waived off.

The Arbitrator Tribunal shall consist of a Panel of three retired Railway Officer retired not below the rank of SAO officer, as the arbitrator. For this purpose, the Railway will send a panel of at least four names of retired Railway Officer(s) empanelled to work as Railway. Arbitrator indicating their retirement date to the contractor within 60 days from the day when a written and valid demand for arbitrators is received by the GM.

Contractor will be asked to suggest to General Manager at least two 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 other from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the three arbitrators so appointed CM shall complete his 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 has served in the Accounts Department."

10. In this regard a Three Judge Judgment of the Apex Court reported in ***Central Organisation for Railway Electrification vs. ECI-SPIC-SMO-MCML (JV) [2019 SCC Online SC 1635]*** in which it is held as follows:

"35. As discussed earlier, after Arbitration and

Conciliation (Amendment) Act, 2015, the Railway Board vide notification dated 16.11.2016 has amended and notified Clause 64 of the General Conditions of Contract. As per Clause 64(3)(a)(ii) [where applicability of Section 12(5) of the Act has been waived off], in a case not covered by Clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a panel of three Gazetted Railway Officers not below the rank of Junior Administrative Grade or two Railway Gazetted Officers not below the rank of Junior Administrative Grade and a retired Railway Officer retired not below the rank of Senior Administrative Grade Officer, as the arbitrators. For this purpose, the General Manager, Railway will send a panel of at least four names of Gazetted Railway Officers of one or more departments of the Railway within sixty days from the date when a written and valid demand for arbitration is received by the General Manager. The contractor will be asked to suggest to General Manager at least two names out of the panel for appointment as contractor's nominees within thirty days from the date of dispatch of the request from the Railway. The General Manager shall appoint at least one out of them as the contractor's nominee and will also simultaneously appoint balance number of arbitrators from the panel or from outside the panel duly indicating the "Presiding Officer" from amongst the three arbitrators so appointed. The General Manager shall complete the exercise of appointing the Arbitral Tribunal within thirty days from the date of the receipt of the names of contractor's nominees.

36. Clause 64(3)(b) of GCC deals with appointment of arbitrator where applicability of [Section 12\(5\)](#) of the Act has not been waived off. In terms of Clause 64(3)(b) of GCC, the Arbitral Tribunal shall consist of a panel of three retired Railway Officers retired not below the rank of Senior Administrative Grade Officers as the arbitrators. For this purpose, the Railway will send a panel of at least four names of retired Railway Officers empanelled to work as arbitrators indicating their retirement date to the contractor within sixty days from the date when a written and valid demand for arbitration is received by the General Manager. The contractor will be asked to suggest the General Manager at least two names out of the panel for appointment of contractor's nominees within thirty days from the date of dispatch of the request of the Railway. The General Manager shall appoint at least one out of them as the contractor's nominee and will simultaneously appoint the remaining arbitrators from the panel or from outside the panel, duly indicating the "Presiding Officer" from amongst the three arbitrators. The exercise of appointing Arbitral Tribunal shall be completed within thirty days from the receipt of names of contractor's nominees. Thus, the right of the General Manager in formation of Arbitral Tribunal is counter- balanced by respondent's power to choose any two from out of the four names and the General Manager shall appoint at least one out of them as the contractor's nominee."

11. The Apex Court in ***Government of Haryana PWD Haryana (B and R) Branch v. G.F.Toll Road Private Ltd [(2019) 3 SCC 505]*** has held as follows:

"An arbitrator who has "any other" past or present "business relationship" with the party is also disqualified. The word "other" used in Entry 1, would indicate a relationship other than an employee, consultant or an advisor. The word "other" cannot be used to widen the scope of the entry to include past/former employees. "

12. This Court also in ***O.P.No.1074 of 2019 [M/s.Copco Engineering Pvt. Ltd., vs. Southern Railway]*** dated 18.03.2020 has held that when the parties are governed by the contract for appointment of Arbitrators, the same has to be followed.

13. In view of the Modified General Conditions of Contract there is no prohibition for appointing retired employees as Arbitrators and the Honourable Apex Court has also held that the Arbitrators can be appointed only as per the contract governing the parties, the Respondents are hereby directed to constitute fresh panel of four retired officers in terms of Clause 64(3)(b) of the modified

General Conditions of the Contract within a period of 30 days from today under intimation to the Petitioner. The Petitioner thereafter shall select an arbitrator from the four selective names and communicate the same to the Respondent within 30 days from the date of receipt of the names of the nominees. Upon receipt of the communication from the Petitioner, the Respondent shall constitute the Arbitral Tribunal in terms of clause 64(3)(b) of the General Conditions of Contract within 30 days from the date of receipt of the communication from the Petitioner. Thereafter, the Arbitrators constituted, shall expedite the hearings and dispose of the matter within six months.

14. With the above directions, both the Original Petitions are disposed of. No costs.

27.07.2020

Index : Yes / No

Internet: Yes

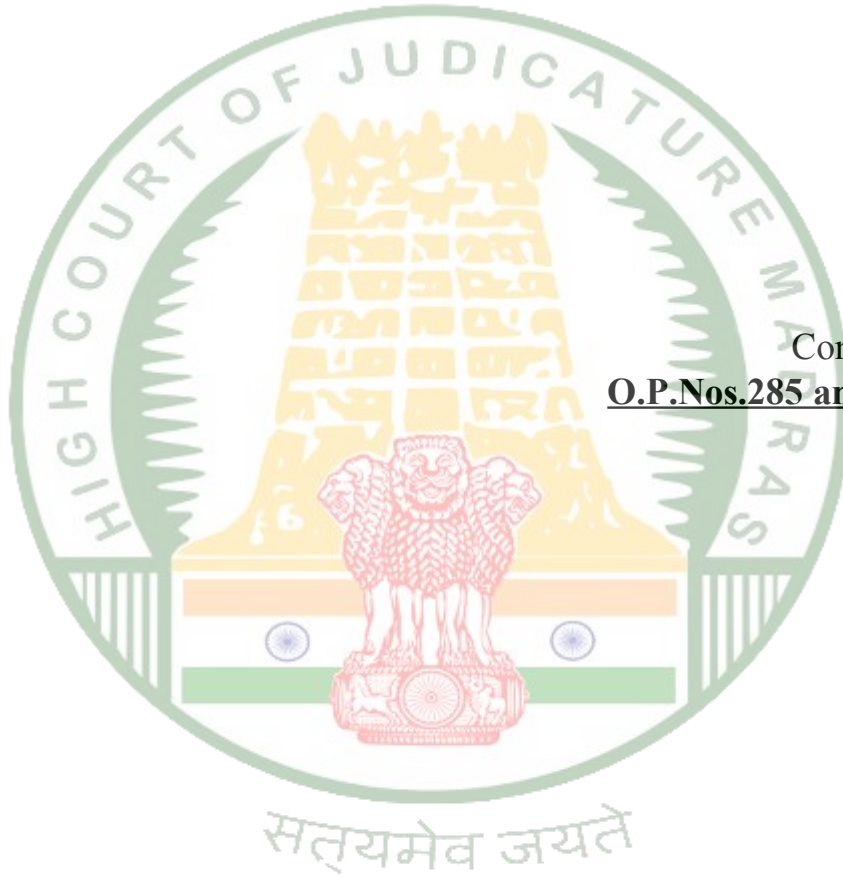
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To

1. The General Manager, Southern Railway, Park Town, Chennai 600003.
2. The Chief Engineer, (MTP Project), Southern Railway, Chennai 600008
3. The Deputy Chief Engineer(Construction),
Southern Railway Administration, Mylapore, Chennai 600004.

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Common order in:
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