

THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Delivered on
11~03~2020	18-03~2020

CORAM:

THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR

O.P.No.1074 of 2019

M/s. COPCO Engineering Pvt. Ltd.,
398 (Old No.766), Poonamallee High Road,
Chennai 600010
Rep.by its Managing Director
Mr.K. George ... Petitioner

Southern Railway,
Office of the Chief Administrative
Officer (Construction),
New No.75, Old No.183,
PH Road, Egmore,
Chennai 600008. ... Respondent

Prayer: Petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 to appoint Arbitral Tribunal to adjudicate upon the disputes arisen between the Petitioner and the Respondent under the Letter of Acceptance dated 21.11.2016 r/w GCC.

For Petitioner : Mr. Anirudh Krishnan

For Respondents : Mr. P.T. Ramkumar
Standing Counsel for
Southern Railways

ORDER

This Original Petition is filed to appoint Arbitral Tribunal to adjudicate upon the disputes arisen between the Petitioner and the Respondent under the Letter of Acceptance dated 21.11.2016.

2. The Brief facts leading to filing of this Petition is as follows:

2(a) The Respondent had invited tenders for construction of Road Over Bridge in Nidamangalam Yard in lieu of existing LC No.20 and Road over bridge in lieu of LC No.1 between Nidamangalam and Mannargudi Station. The Petitioner had submitted its bid and the same stood accepted by the Respondent vide Letter of Acceptance dated 21.11.2016. The contract was entered on 07.09.2017. The estimated cost of construction of the Project was Rs.11,12,056/-.

2(b) Though there was time limit in the agreement to complete the project on or before 21.09.2017, the site was not made available to the Petitioner. The Respondent having failed to obtain the requisite approvals from the Highways Department to commence construction, they foreclosed the Agreement vide letter dated 18.12.2017. The Petitioner vide letter dated 06.06.2019 had communicated to the Respondent to settle the pending claims. The Respondent vide letter dated 17.06.2019 had communicated to the petitioner that the matter would be referred for arbitration only in the event there are any arbitrable disputes. On 16.08.2019 once again the Respondent had rejected the Petitioner's request for reference for Arbitration by holding that the subject matter of dispute qualified as an “expected matter” and by virtue of Clause 61(3) of GCC, no claim or compensation would be payable on account of termination. Hence, it is the claim of the petitioner that Clause 61(3) of GCC does not operate as against the petitioner's claim since the claims of the petitioner's would not amount to “profit or advantage”. Therefore, the petitioner prays to appoint an independent Arbitrator to adjudicate upon the disputes arose between them.

3. Learned counsel appearing for the Petitioner would submit that independent Arbitrator has to be appointed to adjudicate the dispute. Though Clause 64(3) (a) (ii) provides for appointment of Arbitrator such clause is no longer valid in the eye of law in view of the amendment to the Act. Hence it is his contention that the retired Railway Officers are not eligible to be appointed as Arbitrators. Therefore, it is his submission that independent Arbitrator has to be appointed in this case. 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]

4. Learned counsel appearing for the Respondent submitted that the Petitioner has not approached the General Manager to appoint Arbitrator. Whereas he has given request only to the Chief Engineer who has no authority to appoint Arbitrator. Learned counsel for the Respondent fairly conceded that

having considered the request of the Petitioner the rejection order was passed by the Chief Engineer on the ground that the dispute falls within the “expected matters” not correct. However, it is his contention that the competent person to approach for appointment of Arbitrators is only the General Manager as per the Contract. Therefore, it is his contention that the applicant has not approached the General Manager for appointment of Arbitrator. Further, merely because the persons are retired officer or retired from the Government, it cannot be said that they should be treated as ineligible to act as an Arbitrator. In support of his contention he relied upon the following judgments:

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]*

5. 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. "

6. Further Clause 64 (3)(b) of GCC has modified later which deals with appointment of Arbitrator where applicability of Section 12(5) of the Act has not been waived of. 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:

"18. 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. The modified Clause 64(3)(b) inter alia provided that the arbitral tribunal shall consist of a panel of three retired railway officers not below the rank of SAO officer as arbitrator. For this purpose, the Railway will send a panel of at least four names of retired railway officer(s) empanelled. The contractor will be asked to suggest to the General Manager at least two names out of the panel for appointment as the contractor's nominee and the General Manager shall appoint at least one out of them as the contractor's nominee. The General Manager will also simultaneously appoint the balance

number of arbitrators from the panel or from outside the panel."

7. Further, 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. "

8. The Three Judge Judgment of the Apex Court in **Central Organisation for Railway Electrification (supra)** further held as follows:

34. Considering the decision in TRF Limited, in **Perkins Eastman Architects DPC and another v. HSCC (India) Limited** (2019) SCC Online SC 1517, the Supreme Court observed that there are two categories of cases. The first, similar to the one dealt with in TRF Limited where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself; but is authorized to

appoint any other person of his choice or discretion as an arbitrator. Observing that if in the first category, the Managing Director was found incompetent similar invalidity will always arise even in the second category of cases, in para (20) in Perkins Eastman, the Supreme Court held as under:-

“20.If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Limited, all cases having clauses similar to that with which we are presently concerned, a party to the agreement would be disentitled to make any appointment of an Arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an Arbitrator.”

9. Similarly in Paras 22, 26, 37 and 38 of the above judgment the Honourable Apex Court has held as follows:

22. Applying ratio of the Parmar Construction Company, in Pradeep Vinod Construction Company (2019) SCC Online SC 1467, the Supreme Court held that the appointment of arbitrator should be in terms of the agreement and the High Court was not right in appointing an independent arbitrator ignoring Clause 64 of the General Conditions of Contract. As held in Parmar Construction Company and Pradeep Vinod Construction Company, the High Court was not justified in appointing an independent arbitrator without resorting to the procedure for appointment of the arbitrators which has been prescribed under the General Conditions of Contract.

RE: Contention:- Retired Railway Officers are not eligible to be appointed as arbitrators under [Section 12\(5\)](#) read with Schedule VII of the Act and were statutorily made ineligible to be appointed as an arbitrator.

24. The contention of the learned counsel for the respondent is that the panel of arbitrators proposed by the appellant vide letter dated 25.10.2018 comprising of retired employees of the appellant are not eligible to be appointed as arbitrators under [Section 12\(5\)](#) read with Schedule VII of the Act. Further contention of the learned counsel for the respondent is that the panel of arbitrators drawn by the appellant consist of those persons who were railway

employees or Ex-railway employees and therefore, they are statutorily made ineligible to be appointed as arbitrators.

37. 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.

38. In the present matter, after the respondent had sent the letter dated 27.07.2018 calling upon the appellant to constitute Arbitral Tribunal, the appellant sent the communication dated 24.09.2018 nominating the panel of serving officers of Junior Administrative Grade to act as arbitrators and asked the respondent to select any two from the list and communicate to the office of the General Manager. By the letter dated 26.09.2018, the respondent conveyed their disagreement in waiving the applicability of [Section 12\(5\)](#) of the Amendment Act, 2015. In response to the respondent's letter dated 26.09.2018, the appellant has sent a panel of four retired Railway Officers to act as arbitrators giving the details of those retired officers and requesting the respondent to select any two from the list and communicate to the office of the General Manager. Since the respondent has been given the power to select two names from out of the four names of the panel, the power of the appellant nominating its arbitrator gets counter-balanced by the power of choice given to the respondent. Thus, the power of the General Manager to nominate the arbitrator is counter-balanced by the power of the respondent to select any of the two nominees from out of the four names suggested from the panel of the retired officers. In view of the modified Clauses 64(3)(a)(ii) and 64(3)(b) of GCC, it cannot therefore be said that the General Manager has

become ineligible to act as the arbitrator. We do not find any merit in the contrary contention of the respondent. The decision in TRF Limited is not applicable to the present case."

10. The Three Judges Bench of the Apex Court, in fact, has considered the modified Clause 64 (3)(b) and taking into consideration of the earlier judgment of the Apex Court, held that as per the modified clause of General Conditions of Contract, the Arbitral Tribunal shall consist of a panel of three Gazetted Railway Officers [Clause 64(3)(a)(ii)] and three retired Railway Officers retired not below the rank of Senior Administrative Grade Officers [Clause 64(3)(b)]. Independent sole Arbitrator is not necessary and Arbitrators to be appointed from the panel of retired Railway Officers.

11. This Court in ***Offshore Infrastructre Ltd., vs. Bharat Heavy Electricals Ltd., [2017(6) CTC 301]*** has held that there is no prohibition in appointing ex-employee as sole Arbitrator.

12. Learned Single Judge in M/s.JV Engineering Associate Civil

Engineering Contractors vs. General Manager, CORE, Allahabad [O.P.Nos.446 to 449 of 2019 dated 10.02.2020] has held that the General Conditions of Contract continued to be remain and the same has not been modified since the Arbitrators are employees of the Respondent, are fall within the bar contemplated under Section 12(5) of the Act. Accordingly holding so set aside the Award. The above judgment is not applicable to the facts of the present case. Admittedly the modified clause came into existence, which is not in dispute and the same has also discussed by the Apex Court in the judgment in **Central Organisation for Railway Electrification case** (supra).

13. Therefore, now, in view of the majority judgment of the apex Court there is no prohibition for appointment of retired employee and the contract also stipulates the panel of arbitrators to be drawn from the retired employee, this court is of the view that the independent Arbitrator cannot be appointed ignoring the very provision of the contract. It is also relevant to note that the Petitioner has not approached the General Manager to nominate the Arbitrator. Whereas he has sent a letter only to the Chief Engineer. Though the learned counsel has placed much reliance on the following judgments

1. *M/s.Timansh Dhulia Films Pvt. Ltd., vs. M/s.Rajya Sabha Television (RSTV) [2019(5) R.A.J.291 (Del)]*

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

and though learned counsel for the Respondent contended that failure to invoke arbitration clause as contemplated in the agreement, the application for appointment of Arbitrator is not maintainable. Though the above judgments wherein it is held that when the applicant has not approached the appointing authority for nominating Arbitrators, application for appointment of arbitrators under Section 11 not maintainable. Whereas in this case instead of General Manager, notice of invocation given to the Chief Engineer. Therefore, it cannot be said that the petitioner has not initiated action for appointing arbitrators. So, merely because he has addressed the wrong authority that cannot be the ground to non-suit the petitioner in seeking an appointment of arbitrator.

At any event, since the parties are governed by the GCC, there is no prohibition for appointing retired employees, the Respondent is hereby directed to constitute panel of 4 retired officers in terms of Clause 64(3)(b) of the 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.

14. With the above directions, the Original Petition is disposed of. No costs.

18.03.2020

Index : Yes / No

Internet: Yes

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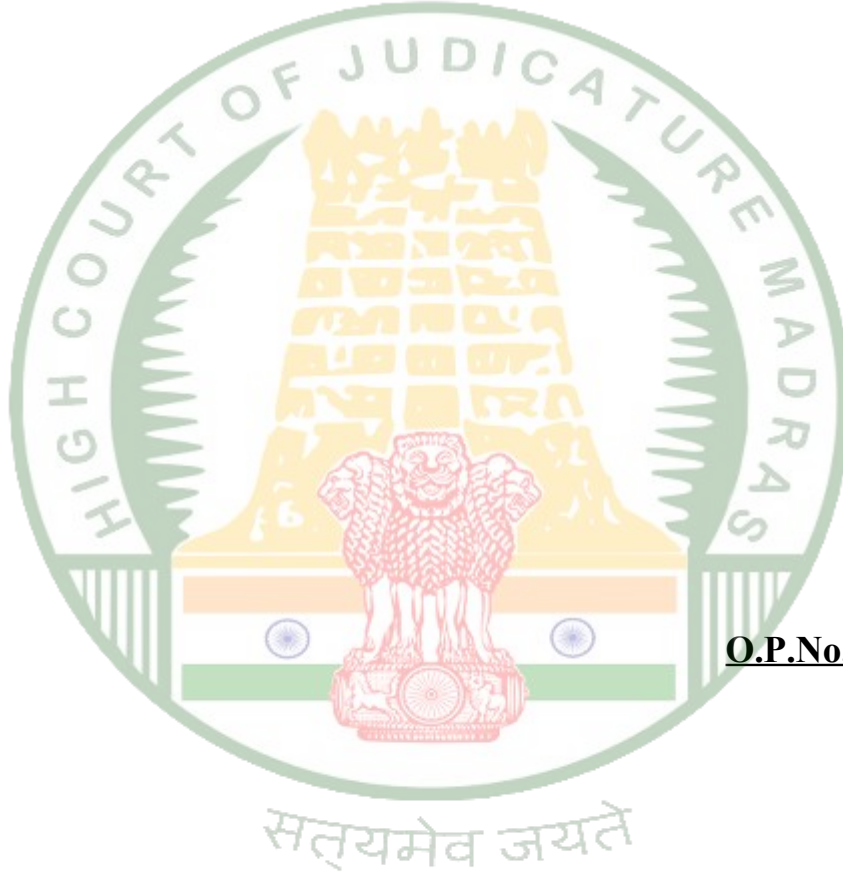
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The Chief Administrative
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N. SATHISH KUMAR, J.

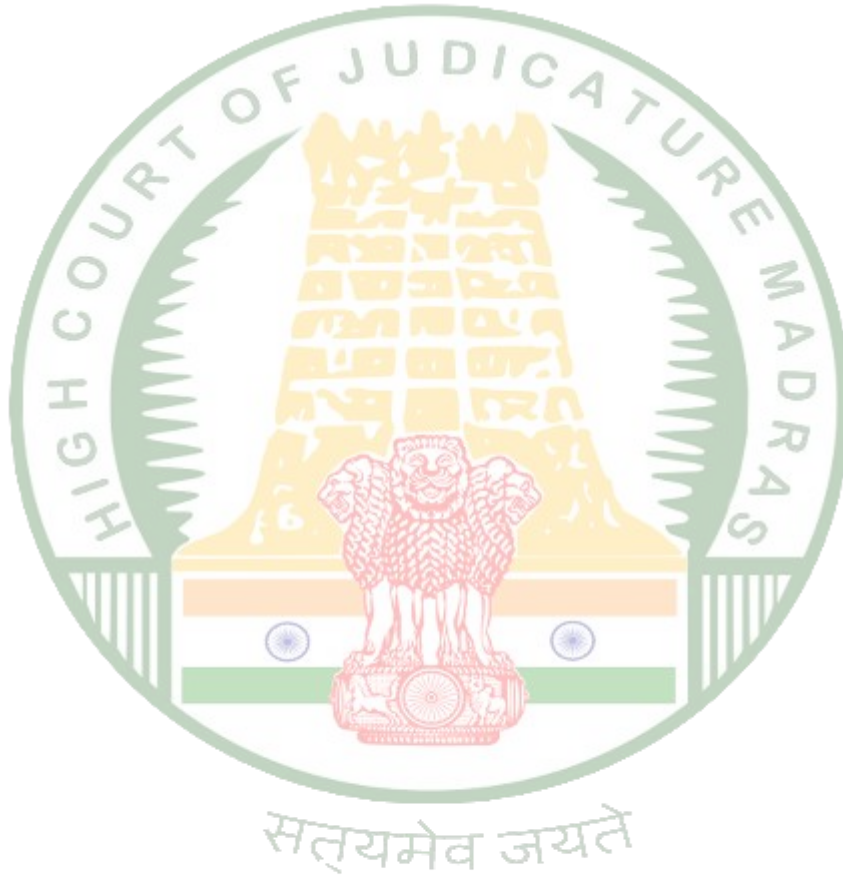
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