

IN THE HIGH COURT OF JUDICATURE AT PATNA
REQUEST CASE No.16 of 2021

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S.P. Singla Constructions Pvt. Ltd. a Company incorporated under the provisions of the Companies Act, 1956 having Registered Office at 1006-1007, Pearls Best Height 1, A-5, Netaji Subhash Place, Pitampura, New Delhi 110034 and its Corporate Office at 47 Sector-9, Panchkula (Haryana) through its Authorized Representative, Mr. A.K. Mirchandani, Male, aged 72 years son of Shri Karamchand Lilaram Mirchandani, resident of House No. 109, Sector 7, Panchkula, P.S. Sector 7, P.O. Sector 8, Panchkula, Haryana.

... .. Petitioner/s

Versus

1. Union of India through Secretary, Ministry of Railways, having office at Rail Bhawan, Rafi Marg, New Delhi- 110001.
2. Chief Engineer/Con/ GB, East Central Railway Hajipur, having office at Mahendrugat, Patna- 800004.

... .. Respondent/s

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Appearance :

For the Petitioner/s : Mr. Anirudha Wadhwa, Advocate
Mr. Satyabir Bharti, Advocate
Ms. Prachi Pallavi, Advocate

For the Respondent/s : Mr. Siddhartha Prasad, Advocate

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CORAM: HONOURABLE THE CHIEF JUSTICE
ORAL JUDGMENT

Date : 15-12-2021

The instant petition filed under Section 11(6) of the Arbitration and conciliation Act, 1996, in the considered opinion of the Court is premature.

2. The parties to the *lis* entered into a written agreement for construction of sub structure above well cap & super structure of South approach Rail viaduct in connection with Ganga Rail-cum-Road Bridge Project, Patna. The agreement dated 05.07.2010, contains a clause for settlement of dispute



which read as under:-

“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 GM and the GM 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, 57 A, 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 expected matters (matters not arbitrable) 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.

64 (1) (i) – **Demand for Arbitration** – In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the “excepted matters’ referred to in Clause 63 of these conditions, the contractors, after 120 days but within 180 days of his presenting his final claim on disputed matters shall demand in writing that the dispute of difference be referred to arbitration.

64 (1) (ii) – The demand 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 (s) or difference(s) in respect of which the demand has been made, together with counter claims or set off, given by the Railway, shall be referred to arbitration and other



matters shall not be included in the reference.

64 (1) (ii) –(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.

(b) The Claimant shall submit his claim stating the facts supporting the claims alongwith 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.

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

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

64 (1) (iii) – 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.

64 (1) (iv) – If the contractor (s) does/do not prefer his /their specific and final claims in writing, within a period of 90 days of receiving the intimations from the Railways that the final bill is ready for payment, he/they will be deemed to have waived his/their claim (s) and the Railway shall be discharged and released of all liabilities under the contract in respect of these claims.”

3. It is a matter of record that on 09.07.2016 (Annexure-6, page 83), petitioner wrote to the General Manager, Eastern Central Railway indicating the claims and the nature of dispute. It is also a matter of record that the General Manager did not respond to the same within a period of 120 days, as is so



required under clause 63 reproduced (supra). Resultantly, petitioner vide a written communication dated 28.09.2020 (Annexure-9, page 91) addressed to the General Manager, East Central Railway invoking the arbitration clause by nominating and appointing a retired Chief Justice of this Court as his nominee. Yet, another time, the respondent did not respond to the same. Hence, the present petition.

4. It is a matter of record that petitioner did not invoke clause 64 as the parties had mutually agreed upon under the agreement. The words of clauses 63 and 64 of the General Conditions of Contract reproduced supra suggest a consequential nature, i.e. clause 63 must be complied with prior to a separate compliance with clause 64. The General Manager has to be within 120 days notify their decision on the matters as enumerated under this clause (matters arbitral and not arbitral) being that excepted matter shall stand excluded from the purview of arbitration clause. The communication of the petitioner dated 09.07.2016 falls as a communication under clause 63.

5. The demand for arbitration to be made under clause 64(1) is to be subsequent to fulfilling the condition of clause 63 and therefore the next communication dated 28.09.2020 would



invoke the said clause. As is apparent from the record, this clause stands not complied with by the petitioner and the petitioner has failed to adhere to the time schedule mentioned in the above said clauses. The communication dated 28.09.2020 is not in the light of the said agreement.

6. In **Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV), (2020) 14 SCC 712**, the Hon'ble Apex Court has held as under:-

“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 Railways 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. The modified Clause 64(3)(b) of the General Conditions of Contract reads as under:

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

The Arbitral Tribunal shall consist of a panel of three retired railway officers retired not below the rank of SAO officer, as the arbitrator. For this purpose, the Railways 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 the Railways. 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 three arbitrators so appointed. The GM shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contract's nominees. While nominating the arbitrators, it will be necessary to ensure that one of them has served in the Accounts Department."

7. The Apex Court in **Central Organisation for Railway Electrification (supra)** has clearly held that the procedure for appointment in the CGC has to be followed and given effect to by the parties, which in the instant case the Court finds the petitioner to have not complied.

8. It is seen that during the pendency of the present petition, respondent vide communication dated 10.08.2021 had suggested the panel of officers for appointment of Arbitral Tribunal. Petitioner has chosen not to respond thereto in view of its communication dated 28.09.2020 as the Court has been orally informed.

9. In view of the law laid down in **Central Organisation for Railway Electrification (supra)**, this Court is left with no



option but to reject the petition reserving liberty to the petitioner to take recourse to the procedure agreed upon to be followed by the parties.

(Sanjay Karol, CJ)

Sujit/Ashwini

AFR/NAFR	
CAV DATE	
Uploading Date	23.12.2021
Transmission Date	

