

IN THE HIGH COURT AT CALCUTTA
ORIGINAL JURISDICTION
ORIGINAL SIDE

A.P. No. 14 of 2019

TANTIA CONSTRUCTIONS LIMITED
Vs.
UNION OF INDIA

BEFORE:

The Hon'ble JUSTICE ASHIS KUMAR CHAKRABORTY

For the petitioner : Ms. Micky Chowdhary, Advocate,
Mr. Sourojit Dasgupta, Advocate,
Mr. Sanjay Kr. Baid, Advocate

For the respondent : Ms. Aparna Banerjee, Advocate,

Judgment on : 11.01.2021

Ashis Kumar Chakraborty, J.

In this application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act of 1996') the petitioner company has prayed for appointment of a sole Arbitrator to resolve the disputes arisen between themselves and the respondent, Eastern Railway relating to the Contract No.CE/C/VI/71 of 2012-2013 dated March 6, 2013 (hereinafter referred to as 'the said contract').

It is the case of the petitioner company that in terms of the said contract they had to carry out the work involving earthwork in filling, cutting, blanketing, construction of minor bridges, platform walls/flooring, drains,

station buildings, gate lodges, roads, etc. and other ancillary works in Bandel (including yard) and Talandu (including yard up to Km. 51.00) in connection with the construction of the third line between Bandel and Bainchi. The terms and conditions under which the petitioner had to carry out the said work were those mentioned in the said contract, as well as the General and Special Conditions of Contract framed by the respondent Railway (hereinafter referred to as 'the GCC'). Clause 63 read with clause 64(1) of the GCC contemplated that all disputes arising between the parties to said contract would be first referred by the contractor to the railway and if the latter fails to decide the matter referred to by the former within 120 days, such matters may be referred to arbitration by the contractor within 180 days of his presenting his final claim on the disputed matters. Since the total value of the work allotted to the petitioner by the respondent railway was more than Rs.10 lac as per clause 64(3)(a)(ii) of the GCC all disputes and differences arisen between the parties to the said contract would be decided by an Arbitral Tribunal. In this regard, clauses 64(3)(a)(ii) and 64(3)(a)(iii) of the GCC are extracted below:

“64.(3)(a)(ii) In cases not covered by 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 Rly. Officers of one or more departments, of the Rly. to the contractor who will be asked to suggest to General Manager upto 2 names out of the panel for appointment as 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 Railways for the purpose of appointment of arbitrators.

64.(3)(a)(iii) If one or more of the arbitrators appointed as above refuses to act as arbitrator withdraws from his office as arbitrator or vacate 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 been appointed. Such re-constituted Tribunal may at its discretion, proceed with the reference of the stage at which it was left by the previous arbitrator(s).

64.(3)(a)(iv)”

According to the petitioner, with the introduction of sub-section (5) of section 12 as well as the Seventh Schedule to the Act of 1996 with effect from October 23, 2015 the General Manager of the respondent railway became ineligible to be involved in the process of constitution of the Arbitral Tribunal and, as such, an independent person is to be appointed as the sole Arbitrator to adjudicate the disputes arisen between the parties to the said contract.

Therefore, by a letter dated July 29, 2017 addressed to the General Manager of the respondent railway the petitioner invoked the arbitration clause and sought such disputes and differences being adjudicated through an advocate suggested by them as the sole Arbitrator. By a letter dated December 20, 2017, the General Manager Of the railway forwarded a panel of four persons, who have retired from the service of the railway, to enable the petitioner to suggest at least two names out of the panel as their nominees and appoint one out of them as their nominee Arbitrator. The petitioner by their letter dated January 2, 2018 informed the General Manager of the respondent railway that in view of the provisions contained in section 12(5) read with the Seventh Schedule to the Act of 1996, the persons named in the letter dated December 20, 2017 are ineligible to be appointed as the Arbitrator and requested the General Manager to take steps in the matter in accordance with law. The said letter, however, evoked no response from the respondent railway. Thus, the petitioner company filed the present application seeking the relief mentioned above.

It was strenuously argued by the learned counsel appearing for the petitioner that in view of the introduction of sub-section (5) of section 12 ,as well as the Seventh Schedule to the Act of 1996, the General Manager of the respondent railway cannot anymore constitute the Arbitral Tribunal. In support of such contention, the petitioner first relied on the decision of the Supreme Court in the case of Perkins Eastman Architects DPC and Another – Vs - HSCC (India) Limited, reported in 2019 SCC OnLine SC 1517. The petitioner further relied on another decision of the Supreme Court in the case

of Central Organisation of Railway Electrification vs. ECI-SPIC-SMO-MCML (JV) A Joint Venture Company. It was submitted that in view of the introduction of sub-section (5) of section 12 and the Seventh Schedule to the Act of 1996 on November 16, 2016, the Railway Board has issued a circular thereby modifying clause 64 of the said GCC as mentioned hereinafter.

It was submitted that as per modified Clause 64 (3) (a) (i) of the GCC (where applicability of Section 12 (5) of the Act has been waived off) when the total value of all claims in question added together does not exceed rupees one crore, the Arbitral Tribunal shall consist of a sole Arbitrator who shall be a Gazetted Officer of Railways not below JA Grade nominated by the General Manager. In terms of modified clause 64(3) (a)(i) of the GCC, the sole Arbitrator shall be appointed within sixty days from the day when a written and valid demand for arbitration is received by the General Manager.

The petitioner further referred to the modified Clause 64(3)(a)(ii) of the GCC, which is extracted below:

“64.(3)(a)(ii) In cases not covered by clause 64(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 GM.

Contractor will be asked to suggest to 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 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. GM 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 SA Grade of other departments of the Railway for the purpose of appointment of arbitrator."

The petitioner next drew the attention of this Court to clause 64(3)(b) of the modified GCC, which reads as follows:

64.(3)(b): Appointment of Arbitrator where applicability of section 12(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 the purpose, the Railway will send a panel of at least four (4) names of retired Railway Officer(s) empanelled to work as Railway Arbitrator duly indicating their retirement date to the contractor within 60 days from the day when a written and valid demand for arbitration is received by the GM.

Contractor will be asked to suggest to 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 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. GM shall complete this exercise of appointing the Arbitrator 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.

64.(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)."

The petitioner contended that the respondent railway cannot unilaterally modify clause 64 of the GCC and, as such, in the instant case they cannot apply modified clause 64(3)(b) of the GCC to obviate the appointment of an independent sole Arbitrator. This point, according to the petitioner, was not decided by the Supreme Court in the case of Central

Organisation for Railway Electrification (supra). Urging all these grounds, the petitioner pressed for appointment of an independent person to act as the sole Arbitrator and adjudicate the disputes arisen between the parties relating to the said agreement dated March 6, 2013.

On the other hand, learned Counsel appearing for the respondent railway raised strong objection to the prayer made by the petitioner company in the present application. It was submitted that as per Clause 63 of the GCC all disputes and difference arising between the parties in connection with the said contract would have to be first referred by the petitioner to the railway who shall within 120 after receipt of the petitioner's representation make and notify its decision in all matters. By referring Clause 64(1)(i) of the GCC it was further submitted that it is only in the event of any failure on the part of the Railway to take any decision with regard to the representation made by the petitioner/contractor within 120 days the petitioner/contractor could have claimed such disputes being adjudicated through arbitration. It was argued for the respondent that in the present case when the petitioner did not comply with the requirement of Clause 63 of the GCC their claim for appointment of arbitrator is not maintainable. It was further contended by the respondent railway that in any event, in terms of modified clause 64(3)(b) of the GCC the General Manager of the respondent railway sent a panel of four retired railway officers to the petitioner company to select two persons out of them for appointment as their nominee of the Arbitral Tribunal comprising two Arbitrators and the Presiding Arbitrator. It was urged that there is no merit in the application filed by the petitioner.

In reply, it was contended by the petitioner that the respondent railway itself gave a go-bye to the requirement of Clause 63 of the GCC and by the letter dated December 20, 2017 they forwarded the panel of four retired Railway Gazetted Officers to the petitioner.

I have considered the materials on record, as well as the arguments advanced by the learned counsel appearing for the respective parties. In the facts of the present case as discussed above, it is evident that it was the petitioner who produced and referred to the circular dated November 16, 2016 issued by the Railway Board and contended that the respondent railway cannot unilaterally modify Clause 64 of the GCC. It is further to be noted that it is the petitioner who cited the decision of the Supreme Court in the case of Central Organisation of Railway Electrification (supra). Thus, in the present case, the only issue to be decided by this Court is whether the amended provisions of Clause 64.(3)(b) of the GCC can be made applicable for constitution of the Arbitral Tribunal to adjudicate the disputes arisen between the parties to the said contract.

As held by the Supreme Court in paragraph 35 of the decision in the case of Central Organisation of Railway Electrification (supra), the decision of Perkins Eastman Architects DPC (supra) is not applicable in the present case where both the petitioner, as well as the respondent railway has the right to nominate their respective Arbitrators for constitution of the Arbitral Tribunal. In the said case of Central Organisation of Railway Electrification (supra) the Supreme Court further held that with introduction of sub-section(5) of Section, as well as the Fi Seventh Schedule to the Act of 1996 the

aforementioned modified Clause 64(3)(b) of the GCC will be applicable in railway contracts. Thus, I find no merit in the contention of the petitioner that respondent railway cannot unilaterally modify clause 64 of the GCC or that modified clause 64 of the GCC is not applicable in this case. The Seventh Schedule to the Act of 1996 does not make a retired railway officer to be an Arbitrator in this case. It is further to be noted that in their letter dated January 2, 2018 the petitioner admitted that the four persons named in the panel forwarded by the General Manager of the respondent railway are all retired railway officers.

For the foregoing reasons, the application AP No. 14 of 2019 fails. The petitioner may select two persons from the panel forwarded by the General Manager of the railway and send their names to the said General Manager who shall thereafter, forthwith proceed to constitute the Arbitral Tribunal as per clause 64(3)(b) of the GCC .

The application A No.14 of 2019 stands dispose off accordingly.

Urgent certified website copies of this judgement, if applied for, be made available to the parties subject to compliance with requisite formalities.

(ASHIS KUMAR CHAKRABORTY, J.)