

AP 112 of 2021
IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
Commercial Division
ITD-ITD CEM JOINT VENTURE
Vs.
KOLKATA METRO RAIL CORPORATION LTD

For the Petitioners	: Mr. Utpal Bose, Sr. Adv. Ms. H. Chakraborty, Adv. Ms. Neelina Chatterjee, Adv.
For the Respondent	: Mr. Bikash Ranjan Bhattacharya, Sr. Adv. Mr. Jishnu Chowdhury, Adv. Ms. Sreya Basu Mallick, Adv. Mr. Ankit Dey, Adv.
Hearing concluded on	: April 07, 2021
Judgment on	: August 24, 2021

DEBANGSU BASAK, J. :-

1. The petitioner has applied under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of arbitrators to adjudicate on the disputes and differences between the parties in respect of the contract dated March 10, 2010.
2. Learned Senior Advocate appearing for the petitioner has submitted that, the parties entered into a contract dated March 10, 2020. Such contract has an arbitration clause. He has referred to

Clause 17.9 which is the arbitration clause. He has submitted that the arbitration clause contemplate that the respondent would supply a panel of five arbitrators for the petitioner to choose one from such panel. The petitioner had invoked the arbitration clause by a letter dated January 9, 2021. In response thereto, the respondent by a letter dated February 1, 2021 had forwarded a panel of five arbitrators. He has commented upon the panel suggested by the respondent. According to him, the panel comprises of ex-employees of Indian Railways. He has referred to the reply dated February 10, 2021 by which, the petitioner had suggested a retired judge of this Hon'ble Court as the arbitrator.

3. Learned Senior Advocate appearing for the petitioner has submitted that, the panel of arbitrators as suggested by the respondent is disqualified under Section 12(5) of the Act of 1996 read with Schedule 5 and 7 thereof. According to him, the respondent is a Central Public Sector Enterprise with the Ministry of Railways holding over 51 per cent of the shares of the respondent. According to him, the respondent is under the Ministry of Railways. He has pointed out that, the panel suggested by the respondent consists of retired personnel of

the Railways. He has contended that, as retired employees of Indian Railways they suffer the embargo of the fifth and the seventh Schedule of the Act of 1996. There is justifiable doubt as to the impartiality and independence of the panel. In support of his contentions, learned senior advocate appearing for the petitioner has relied upon **2017 Volume 4 Supreme Court Cases 665 (Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Limited), the order dated March 12, 2020 passed in AP No. 732 of 2018 (M/S Tania Construction Limited v. Union of India), 2020 SCC Online Bom 681 (Afcons Infrastructure Limited v. Konkan Railways Corporation Limited), 2020 Volume 14 Supreme Court Cases 712 (Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV) A Joint Venture Company)** and the order dated **March 17, 2021 passed in AP No. 297 of 2018 (Techma Engineering Enterprises Pvt. Ltd. v. Union of India).**

4. Learned Senior Advocate appearing for the respondent has submitted that, none of the persons comprised in the panel suggested by the respondent stands disqualified under Section 12(5) of the Act of 1996 or the Schedule 5 or Schedule 7 thereof. He has submitted that,

the persons comprised in the panel retired from Railway service a long time ago. There cannot be any justifiable reason to doubt the impartiality and independence of the members constituting the panel. He has submitted that, the Court cannot re-write the contract between the parties. In any event, during the pendency of the matter, the respondent had forwarded a name of three more arbitrators from which, the petitioner can choose any. In aggregate the respondent has forwarded eight names to the petitioner.

5. Referring to ***Central Organization for Railways Electrification (supra)*** learned senior advocate appearing for the respondent has submitted that, in the facts of the present case, there is no irregularity in the respondent forwarding a panel of arbitrators for the petitioner to choose from. Therefore, he has submitted that, the Court need not exercise jurisdiction under Section 11(6) of the Act of 1996.

6. In reply, learned Senior Advocate for the petitioner has relied upon the order dated January 11, 2021 of the Supreme Court passed in ***SLP (c) No. 12670 of 2020 (Union of India vs. M/s Tania Construction Limited)*** and submitted that, the ratio of ***Central Organization of***

Railway Electrification (supra) has been doubted and referred to a larger Bench.

7. In the facts of the present case, the respondent has issued a notice inviting tender for deciding and construction of underground section from Central Station to Subhas Sarovar for Kolkata East West Metro Rail Project (UG-2). The petitioner had participated in such tender. The respondent had issued a letter of acceptance dated February 9, 2010 to the petitioner after having found the petitioner to be suitable. The parties had entered into a contract agreement being Contract No. KMRCL/CE/UG-2/06/10 dated March 10, 2010. The contract document has an arbitration clause which is as follows :-

“17.9 If the efforts to resolve all or any of the disputes through conciliation fails, then such disputes or differences, whatsoever arising between the parties, arising out of touching or relating to construction/manufacture, measuring operation or effect of the Contract or the breach thereof shall be referred to Arbitration in accordance with the following provisions:

(a) Matters to be arbitrated upon shall be referred to a sole Arbitrator if the total value of the claim is upto Rs. 5 million and to a panel of three Arbitrators if total value of claims is more than Rs. 5 million. The employer shall provide a panel of three arbitrators for the claims upto

Rs. 5 million and a panel of five arbitrators for claims of more than Rs. 5 million. The Contractor shall have to choose the sole Arbitrator from the panel of three and/or one arbitrator from the panel of five in case of three Arbitrators are to be appointed. The Employer shall also choose one Arbitrator from this panel of five and the two so chosen will choose the third arbitrator from the panel only. The Arbitrators) shall be appointed within a period of 30 days from the date of receipt of written notice/ demand of appointment of Arbitrator from either party. Neither party shall be limited in the proceedings before such arbitrator(s) to the evidence or arguments put before the Engineer for the purpose of obtaining his decision. No decision given by the Engineer in accordance with the foregoing provisions shall disqualify him from being called as a witness and giving evidence before the arbitrator(s) on any matter, whatsoever, relevant to dispute or difference referred to arbitrators). The arbitration proceedings shall be held in Kolkata only. The language of proceedings, that of documents and communication shall be English.

(b) The Employer at the time of offering the panel of Arbitrator(s) to be appointed as Arbitrator shall also supply the information with regard to the qualifications of the said Arbitrator nominated in the panel along with their professional experience, phone nos. and addresses to the Contractor.

(c) The award of the sole Arbitrator or the award by majority of three Arbitrators as the case may be shall be binding on all parties.”

8. Disputes and differences having arisen between the parties covered under the arbitration agreement, the petitioner by a notice dated January 9, 2021 referred such disputes to arbitration. By a letter dated February 1, 2021, the respondent had suggested a panel of five arbitrators for the petitioner to choose its arbitrator in terms of the arbitration agreement. The petitioner by a writing dated February 10, 2021 had nominated a person as an arbitrator who is not named in the panel of arbitrators contained in the letter dated February 1, 2021 by the respondent. In response thereto, the respondent by its letter dated February 23, 2021 had called upon the petitioner to nominate its arbitrator from the panel of arbitrators forwarded to the petitioner. The petitioner had thereafter approached the Court by way of the present application under Section 11 by the Act of 1996.

9. In ***Voestalpine Schienen GMBH (supra)*** the Supreme Court has considered the amendment of Section 12 of the Act of 1996 and the validity of a panel of arbitrators that, in the facts of that case, Delhi Metro Rail Corporation Limited forwarded to the petitioner therein for the purpose of nominating its arbitrator. It has observed as follows :-

“25. Section 12 has been amended with the objective to induce neutrality of arbitrators viz. their independence and impartiality. The amended provision is enacted to identify the “circumstances” which give rise to “justifiable doubts” about the independence or impartiality of the arbitrator. If any of those circumstances as mentioned therein exists, it will give rise to justifiable apprehension of bias. The Fifth Schedule to the Act enumerates the grounds which may give rise to justifiable doubts of this nature. Likewise, the Seventh Schedule mentions those circumstances which would attract the provisions of sub-section (5) of Section 12 and nullify any prior agreement to the contrary. In the context of this case, it is relevant to mention that only if an arbitrator is an employee, a consultant, an advisor or has any past or present business relationship with a party, he is rendered ineligible to act as an arbitrator. Likewise, that person is treated as incompetent to perform the role of arbitrator, who is a manager, director or part of the management or has a single controlling influence in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration. Likewise, persons who regularly advised the appointing party or affiliate of the appointing party are incapacitated. A comprehensive list is enumerated in Schedule 5 and Schedule 7 and admittedly the persons empanelled by the respondent are not covered by any of the items in the said list.

26. It cannot be said that simply because the person is a retired officer who retired from the government or other statutory corporation or public sector undertaking and had

no connection with DMRC (the party in dispute), he would be treated as ineligible to act as an arbitrator. Had this been the intention of the legislature, the Seventh Schedule would have covered such persons as well. Bias or even real likelihood of bias cannot be attributed to such highly qualified and experienced persons, simply on the ground that they served the Central Government or PSUs, even when they had no connection with DMRC. The very reason for empanelling these persons is to ensure that technical aspects of the dispute are suitably resolved by utilizing their expertise when they act as arbitrators. It may also be mentioned herein that the Law Commission had proposed the incorporation of the Schedule which was drawn from the red and orange list of IBA guidelines on conflict of interest in international arbitration with the observation that the same would be treated as the guide “to determine whether circumstances exist which give rise to such justifiable doubts”. Such persons do not get covered by red or orange list of IBA guidelines either.”

10. In ***Tantia Construction Limited (supra)*** the High Court has noted the amendment to Section 12 of the Act of 1996. In the facts of that case, the disputes were between the petitioner therein and the Indian Railways. In the facts of that case, the Court had constituted the arbitral panel on the finding that Indian Railways did not prepare a fresh panel comprising of persons who were not covered by any of the categories of the Seventh Schedule to the Act of 1996.

11. In ***Afcons Infrastructure Limited (supra)***, the Bombay High Court has considered an arbitration agreement which permitted the respondent therein to have an arbitral tribunal consisting of a panel of three gazetted railway officers. In such circumstances, the Court had found that, the provisions under the contract for constitution of the standing arbitral tribunal were violation of the amended provisions of Section 12 of the Act of 1996 read in conjunction with the 5th and 7th Schedule thereof.

12. In ***Central Organization of Railway Electrification (supra)*** the Supreme Court has considered an arbitration agreement which permitted constitution of a panel of arbitrators of three gazetted railway officers and three retired railway officers not below the specified rank. It has held as follows:-

“39. There is an express provision in the modified clauses of General Conditions of Contract, as per Clauses 64(3)(a)(ii) and 64(3)(b), 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)]. When the agreement specifically provides for appointment of the Arbitral Tribunal consisting of three arbitrators from out of the panel of serving or retires railway officers, the

appointment of the arbitrators should be in terms of the agreement as agreed by the parties. That being the conditions in the agreement between the parties and the General Conditions of the contract, the High Court was not justified in appointing an independent sole arbitrator ignoring Clauses 64(3)(a)(ii) and 64(3)(b) of the General Conditions of Contract and the impugned orders cannot be sustained.”

13. Although the Supreme Court has referred **Central Organization for Railways Electrification (supra)** to a larger Bench in **Union of India (supra)** the same is yet to be overruled.

14. In **Techma Engineering Enterprises Pvt. Ltd. (supra)** the Court found that the railways had unilaterally appointed its retired employee as an arbitrator initially and on his demise proceeded to appoint another arbitrator subsequent to the petitioner approaching the Court under Section 11(6) of the Act of 1996. It has held that, the Railways did not afford the contractor therein a panel of arbitrators to choose its arbitrator therefrom. In such view, the Court had appointed an arbitrator.

15. The contention of the petitioner that since the panel of arbitrators suggested by the respondent consists of retired Indian Railways personnel they suffer the embargo under the fifth and the seventh

schedule of the Act of 1996 has been considered and negated in ***Voestalpine Schienen GMBH (supra)***. The petitioner has not placed on record any material to establish that any of the members of the panel had any connection with the respondent with regard to the contract in question. The Supreme Court in ***Voestalpine Schienen GMBH (supra)*** has held that, bias or even real likelihood of bias cannot be attributed to highly qualified and experienced persons simply on the ground that they served the Central Government or the Public Sector Undertaking.

16. In such circumstances, I find no merit in the contention of the petitioner. The petitioner is at liberty to choose its arbitrator from amongst the panel of eight arbitrators as has been forwarded by the respondent to the petitioner, within 4 weeks from date.

17. AP No. 112 of 2021 is disposed of accordingly without any order as to costs.

[DEBANGSU BASAK, J.]