

ORDER SHEET

AP 297 of 2018
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
ORIGINAL SIDE

TECHMA ENGINEERING ENTERPRISES PVT. LTD.
VS
UNION OF INDIA THROUGH GENERAL MANAGER
(ENGINEERING) SOUTH EASTERN RAILWAY

BEFORE:
The Hon'ble JUSTICE DEBANGSU BASAK
Date: 17th March, 2021.

(Via Video Conference)

Mr. K.K. Thakar,
Mr. Priyankar Saha,
Mr. Debraj Basu, Advs.
...for the petitioner
Mr. Arun Kumar Mishra,
Mr. Hemant Tiwari, Advs.
...for Union of India

The Court: The application under Section 11(6) of the Arbitration and Conciliation Act, 1996 is taken up for final hearing on completion of affidavits.

The petitioner participated in a tender of the Railways on August 12, 2016. A contract between the parties came into being through the submission dated September 20, 2016 of the petitioner and the letter dated December 20, 2016 of the Railways. The contract was in respect of manufacturing and supply of 315912 numbers of ERC Mark III as per the terms and conditions stated in the letter dated December 20, 2016 subject to the Indian railway Service (IRS) condition of contract applicable and other terms and conditions of the tender document.

Disputes and differences arose between the parties.

The Railways by a letter dated January 25, 2018 appointed an arbitrator which the respondents did not accept by the letter dated February 18, 2018. The petitioner is before Court seeking appointment of an arbitrator.

Learned advocate appearing for the petitioner submits that, the arbitrator originally appointed by the Railways expired. The petitioner approached the Court under Section 11(6) of the Act of 1996. Subsequent thereto, the Railways appointed another arbitrator as a substitute of the original arbitrator. He submits referring to arbitration clause in the contract and in view of the ratio of **(2017) 8 Supreme Court Cases 377 (TRF Limited vs. Energo Engineering Projects Ltd.)** and **2019 SCC Online SC 1517 (Perkins Eastman Architects DPC vs. HSCC (India) Limited)** that, in fact the initial appointment and the subsequent appointment are bad in law after the amendments to the Act of 1996 in 2015.

Learned advocate appearing for the petitioner submits that, the change in the terms and conditions of the tender by the writing dated February 16, 2017 is of no consequence so far as the petitioner is concerned. He submits the purchase order issued subsequently on February 22, 2017 should not be construed to mean that the petitioner agreed to the modified terms of the arbitration agreement. He submits that, an arbitration agreement can come into being as provided under Section 7 of the Act of 1996. In the facts of the present case, the petitioner never wrote back to the Railways accepting that the petitioner was agreeable to the amendment in the arbitration agreement as undertaken by the notification dated February 16, 2017. The parameters of Section 7 of the Act of 1996 were not fulfilled so far the Purchase Order and amendments are concerned.

Learned advocate appearing for the petitioner submits that the purchase order cannot be construed to be a novation of the contract. He relies upon **2008) 2 Supreme Court cases 672 (Delhi Development Authority, N.D. & Anr. Vs. Joint Action Committee, Allottee of SFS Flats & Ors.)** and **2008 (13) Supreme Court Cases 597 (Bharat Sanchar Nigam Ltd. & Anr. vs. BPL Mobile Cellular Ltd. & Ors.)** for such proposition.

Relying upon (2014) 3 Cal Law Times 332 learned Advocate appearing for the petitioner submits that, Clause 2900[c] of the Contract cannot be construed to be in that, the parties cannot be sent to arbitration. He submits that, no novation took place, clause 2900[c] does not come into play. In support of such contention, he relies upon **(2014) 5 Supreme Court Cases 1 (Enercon (India) Limited and Others –Versus- Enercon GMBH And Another).**

Learned Advocate appearing for the petitioner relies upon an order dated January 25, 2021 passed in **AP No. 348 of 2019 (R.K.Associates and Hoteliers Pvt. Ltd. -Versus Eastern Railway)** in support of the contention that, clause 2900[c] was construed by a co-ordinate Bench and that the co-ordinate Bench found such clause to be in applicable.

Learned Advocate appearing for the petitioner relies upon **(2018) 2 CHN 206 (Union of India-Versus-Palzer Machine Craft Private Limited)** and submits that, clause 2900[c] of the standard form was considered and that, the same was found not to denude the authority of the Court to refer the parties to arbitration under Section 11 of the Arbitration and Conciliation Act, 1996.

Learned Advocate appearing for the railway submits that, subsequent to the contract being entered into a condition of contract was changed by the

notification dated February 16, 2017. The purchase order was issued on February 22, 2017. The parties acted on the basis of such purchase order. He draws the attention of the Court to the contents of the purchase order dated February 16, 2017, The purchase order stipulates that the same is governed by the latest amendment to the contract necessarily. Therefore, the amendment of the contract on February 16, 2017 comes into operation. The parties are governed by the Contract as amended by the notification dated February 16, 2017.

Learned Advocate appearing for the respondent relies upon **(2017) SCC Online Cal 5835 (Veekay General Industries & Anr.-Versus- Union of India & Ors.)** and submits that, clause 2900[c] of the General Conditions was construed by the Court and found that, the disputes were not arbitrable.

Learned Advocate appearing for the Railway relying upon **(2020) 14 Supreme Court Cases 712 (Central Organisation For Railway Electrification-Versus-ECI-SPIC-SMO-MCML (JV) A Joint Venture Company)** submits that, by virtue of Section 12[5] of the Act of 1996 as amended, there is no bar to the railways appointing an Arbitrator. Therefore, he submits that, since the railways appointed an Arbitrator the Court should not exercise jurisdiction under Section 11 of the Act of 1996. In the facts of the present case, therefore, he submits that, the Court should not make any reference.

The arbitration clause concerning the present proceeding is as follows:-

- (a) *In the event of any question, dispute or difference arising under these conditions or any special conditions of contract, or in connection with this contract (except as to any matters the decision of which is*

specially provided for by these or the special conditions) the same shall be referred to the sole arbitration of a Gazetted Railway Officer appointed to be the arbitrator, by the General Manager in the case of contracts entered into by the Zonal Railways and Production Units: by any Member of the Railway Board, in the case of contracts entered into by the Railway Board and by the Head of the Organization in respect of contracts entered into by the other Organisations under the Ministry of Railways. The Gazetted Railway Officer to be appointed as arbitrator however will not be one of those who had an opportunity to deal with the matters to which the contract relates or who in the course of their duties as railway servant have expressed views on all or any of the matters under dispute or difference. The award of the arbitrator shall be final and binding on the parties to this contract.

- (b) In the event of the arbitrator dying, neglecting or refusing to act or resigning or being unable to act for any reason, or his award being set aside by the court for any reason, it shall be lawful for the authority appointing the arbitrator to appoint another arbitrator in place of the outgoing arbitrator in the manner aforesaid.*
- (c) It is further a term of this contract that no person other than the person appointed by the authority as aforesaid should act as arbitrator and that if for any reason that is not possible, the matter is not to be referred to arbitration at all.*
- (d) The arbitrator may from time-to-time with the consent of all the parties to the contract enlarge the time for making the award.*

- (e) *Upon every and any such reference, the assessment of the cost incidental to the reference and award respectively shall be in the discretion of the arbitrator.*
- (f) *Subject as aforesaid, the Arbitration Act, 1940 and the rules thereunder and any statutory modifications thereof for the time being in force shall be deemed to apply to the arbitration proceedings under this clause.*
- (g) *The venue of arbitration shall be the place from which the acceptance note is issued or such other place as the arbitrator at his discretion may determine.*
- (h) *In this clause the authority, to appoint the arbitrator includes, if there be no such authority, the officer who is for the time being discharging the functions of that authority, whether in addition to other functions or otherwise.*

By a notification dated February 16, 2017, railways amended the IRS Conditions of Contract - Para 2900.

The amended clause 2900 is as follows:

Revised Clause No.

Revised Clause

2900 (a) (i)

In the event of any question, dispute or difference arising under these conditions or any special conditions of contract, or in connection with this contract [except as to any matters the decision of which is specially provided for by these or the special conditions, i.e., excepted matters (non-arbitrable)] the same shall be referred to the sole arbitration of an Arbitrator in terms of the Arbitration and Conciliation Act, 1996 as amended by Arbitration and Conciliation (Amendment) Act, 2015. Arbitrator shall be a person possessing

- qualifications laid down in para 2900 (a) (ii) and shall be appointed by the General Manager in the case of contracts entered into by the Zonal Railways and Production Units; by any Member of the Railway Board/Director General (Railway Stores), in the case of contracts entered into by the Railway Board and by the Head of the Organization in respect of contracts entered into by the other Organizations under the Ministry of Railways.
- 2900(a) (ii) *Qualification for appointment as Sole Arbitrator:*
 (a) Retired Railway Officer not below SAG level 3 years after his date of retirement.
 (b) Age of Arbitrator at the time of appointment shall not exceed 70 years.
- 2900(a) (iii) *An Arbitrator may be appointed notwithstanding the total no. of arbitration cases in which he has been appointed in the past. Retired Railway officer being appointed as arbitrator, however, will not be one of those who had an opportunity to deal with the matters to which the contract relates or who in the course of their duties as railway servant have expressed views on all or any of the matters under dispute or difference.*
- 2900(a) (iv) *The award of the arbitrator shall be final and binding on the parties to this contract.*
- 2900(b)
 (no change) *In the event of the arbitrator dying, neglecting or refusing to act or resigning or being unable to act for any reason, or his award being set aside by the court for any reason, it shall be lawful for the authority appointing the arbitrator to appoint another arbitrator in place of the outgoing arbitrator in the manner aforesaid.*
- 2900(c)
 (no change) *It is further a term of this contract that no person other than the person appointed by the authority as aforesaid should act as arbitrator and that if for any reason that is not possible, the matter is not to be referred to arbitration at all.*
- 2900(d) *Deleted*
- 2900 (e) (i) *The cost of arbitration shall be borne by the concerned parties in terms of section 31(A) of*

Arbitration and Conciliation Act, 1996 as amended by Arbitration and as amended by Arbitration and Conciliation (Amendment) Act, 2015.

2900 (h)
(no change)

In this clause the authority, to appoint the arbitrator includes, if there be no such authority, the officer who is for the time being discharging the functions of that authority, whether in addition to other functions or otherwise.

In the facts of the present case, the railways appointed Mr. Ranjan Tewari as the Arbitrator on January 25, 2018. Such Arbitrator passed away consequent upon which the railways appointed an Arbitrator on June 22, 2018. The application under Section 11 of the Arbitration and Conciliation Act, 1996 was affirmed on May 2, 2018. The present application is, therefore, prior to the second appointment of the Arbitrator.

In ***TRF Limited (supra)*** the Supreme Court is of the view that, once the Arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act of 1996 he cannot nominate another person as an Arbitrator. It observes that, once the infrastructure collapses, the superstructure is bound to collapse.

Perkins Eastman Architects DPC and another (supra) which considered ***TRF Limited (supra)*** is of the following view:

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20. *We thus have 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 empowered or authorised to*

appoint any other person of his choice or discretion as an arbitrator. 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.

21. *But, in our view that has to be logical deduction from TRF Limited. Paragraph 50 of the decision shows that this Court was concerned with the issue, “whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an Arbitrator”. The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or*

in the outcome or decision thereof, must not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) and recognized by the decision of this Court in TRF Limited.

In ***Perkins Eastman Architects DPC and another (supra)*** the Arbitrator was appointed by the authority suffering the inability under Section 12(5) of the Act of 1996. The Court found that, there was no hindrance in entertaining an application under Section 11[6] of the Act of 1996 despite such appointment being made, since the so-called appointment was bad in law.

In ***Delhi Development Authority And Another (supra)*** the Supreme Court dealt with issue of novation of a contract. It is of the view that, novation of contract cannot be done unilaterally, and the new terms must be brought to the knowledge of the offeree and his acceptance thereto must be obtained. In the facts of the present case, there is nothing on record to suggest that, the amendment to the conditions of contract introduced to clause 2900 by the notification dated February 16, 2017 was brought to the notice of the petitioner at the time of placement of the purchase order or even subsequent thereto.

In ***Bharat Sanchar Nigam Limited And Another (supra)*** the Supreme Court considers novation of contract and is of the view that, circulars/letters cannot ipso facto be given effect to unless they become part of the contract. If the parties were ad idem as regards terms of the contract, any change in the tariff could not be made unilaterally. Any novation in the contract is required to be done on the same terms as are required for entering into a valid and concluded contract.

There is no material on record to establish that the railways brought the amendment to the notice of the petitioner or that the petitioner accepted such amendment.

In the facts of the present case, the railways not having brought the amendment dated February 16, 2017 to the notice of the petitioner and the petitioner not having accepted the same, it would be inappropriate to hold that, the contract between the petitioner as amended by the notification dated February 16, 2017 governs the parties. The parties are, therefore, governed by the unamended clause 2900 of the contract relating to arbitration.

A clause akin to clause 2900[c] came up for consideration before the Court in ***Sethi Constructions (supra)***. It is of the view that, such a clause ought to be read down on the ground such clause interferes with the authority of the Chief Justice or designate to take the necessary measures under Section 11 of the Act of 1996.

Clause 2900[c] was considered by two Division Benches of this Hon'ble Court in ***Veekay General Industries & Another (supra)*** and ***Palzer Machine Craft Private Limited (supra)***. In ***Veekay General Industries & Another (supra)*** an order passed under Section 9 of the Act of 1996 was under consideration. It noticed clause 2900[c] of the IRS General Conditions. It found that, there was no future to any arbitral reference in view of the fact that, the petition under Section 11 of the Act of 1996 was disposed of and that, the parties did not apply afresh under Section 11 of the Act of 1996. Since there was no possibility of arbitration the Court found the order under Section 9 to be without jurisdiction.

In ***Palzer Machine Craft Private Limited (supra)*** the Division Bench considers clause 2900[c] of the Indian Railways Standard Conditions of Contract. It is of the view that, if the Court can make a reasonable distinction between the primary agreement to carry the disputes to a private forum and the manner and composition of such forum the arbitration agreement could not be lost for unavailability for the specified forum. In the facts of that case the Court proceeded to reject the challenge to the award on the ground of composition of the Arbitral Tribunal.

In **Central Organisation for Railways Electrification (Supra)**, the Supreme Court is of the view that there is no bar under Section 12(5) of the Act of 1996 for appointment of a retired employee to act as an Arbitrator. In the facts of that case, the Supreme Court considered the conduct of the parties as to whether, the appointing authority submitted a panel of Arbitrators for the other party to choose therefrom. **Perkins Eastman Architects DPC (Supra)** is noticed in **Central Organisation for Railways Electrification (Supra)**. In such view, the Court holds that there is no bar under Section 12(5) of the Act of 1996 for appointment of a retired employee to act as an Arbitrator.

In the facts of the present case, the appointment undertaken by the Railways was not in accordance with the ratio laid down in **Central Organisation for Railways Electrification (supra)**. The petitioner herein was not afforded a panel of Arbitrators to choose one from them. The railways unilaterally appointed its retired employee as an Arbitrator initially and on his demise proceeded to appoint another subsequent to the petitioner approaching the Court under Section 11(6) of the Act of 1996. Such a process cannot pass the test of **Central Organisation for Railways Electrification (Supra)** and is hit by **TRF Limited (Supra)** and **Perkins Eastman Architects DPC (Supra)**.

A coordinate Bench in AP 348 of 2019 (**R. K. Associates and Hoteliers Pvt. Ltd. Vs. Eastern Railway**) proceeded to appoint an Arbitrator in respect of a matter where parties were governed by the provision of clause 2900 of the Indian Railways Standard Conditions of Contract.

In **Enercon India Ltd and Others (Supra)** the Supreme Court considers the issue of place or Judicial seat or seat of arbitration. In such context, it is of the view that, where the arbitration agreement is separable from the parent contract or the matrix contract, such an arbitration agreement should be enforced on the principle of separability of the arbitration agreement.

In the facts of the present case, Clause 2900 (c) of the IRS governing the parties to the present petition, cast a cloud on the powers of the Chief Justice under Section 11 of the Act of 1996. It is also contrary to Section 12(5). In the event, the contention of the railways that there will be no arbitration if the appointment is not made in terms of Clause 2900(a) is accepted, then the same will tantamount to obviating Section 11 and 12(5) of the Act of 1996. The arbitration agreement is in Clause 2900(a). It provides for an appointment mechanism. The appointment mechanism is bad in law in view of the ratio of **TRF Limited (Supra)** and **Perkins Eastman Architects DPC (Supra)**, amongst others. The arbitration agreement is separable from the appointing mechanism in the strength of the ratio of **Sethi Constructions (supra)**. The appointment procedure having failed, the Railways cannot claim that, they will not undertake an arbitration. Such a situation was found to be invalid by the Division Bench of our Court in **Palzer Machine Craft Private Limited (Supra)**, the ratio of **Veekay General Industries and Anr. (Supra)** is not attracted in view of the factual difference between that case and the facts objecting in the present case. In the facts of the present case Section 11(6) application is under consideration whereas in **Veekay General Industries and Anr. (Supra)** Section 11 application was disposed of.

In view of the discussions above, it would be appropriate to appoint Mr. Justice Sahidullah Munshi (Retired) as the Arbitrator in terms of the arbitration agreement. The learned Arbitrator will fix his remuneration which will be shared by the parties equally. The parties will bear the costs and expenses of the arbitration equally.

The parties will communicate this order to the learned Arbitrator.

AP 297 of 2018 is disposed of accordingly.

(DEBANGSU BASAK, J.)