



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.08.2021

CORAM :

THE HON'BLE MR.SANJIB BANERJEE, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE P.D.AUDIKESSAVALU

O.S.A.No.119 of 2021

& CMP.NO.5366 of 2021

General Manager, CORE, Allahabad
Rep. by Deputy Chief Engineer
Railway Electrification
Egmore,
Chennai.

.. Appellant/ Respondent

Vs.

M/s. JV Engineering Associate
Civil Engineering Contractors
17, Kuttakattu Valasu
Elumathur (PO), Modakurichi (via)
Eorde 638 104
Tamil Nadu
Rep. by its Partner S.Jaikumar.

.. Respondent/ Petitioner

Appeal filed against the Fair and Decretal Order of this Court dated 10.02.2020 in O.P.No.448 of 2019 filed Under Section 34(2)(b)(iii) of the Arbitration and Conciliation Act 1996 against the award dated 07.11.2018 passed by the sole Arbitrator.

For Appellant : Mr.P.T.Ramkumar
For Respondent : Mr.P.J.Rishikesh

JUDGMENT

(Made by the Hon'ble Chief Justice)

The appellant questions the propriety of an order setting aside an arbitral award merely on the ground that the arbitrator was apparently disqualified to take up the reference. The judgment and order impugned was passed on February 10, 2020 on a petition under Section 34 of the Arbitration and Conciliation Act, 1996 and without calling for an affidavit.



2. The respondent herein entered into an agreement for supply of certain material to the railways. It is not in dispute that Clause 64 of the general conditions governing the railway contracts was applicable. Indeed, by a letter dated August 24, 2017, the contractor invoked the arbitration agreement and required the procedure in Clause 64 of GCC, as it then stood, to be adhered to. The demand for the arbitral reference was made in connection with the respondent's claim of an amount below Rs.25 lakh. The last paragraph of the relevant letter is quoted:

"In view of the above foregoing facts, I demand appointment of Arbitral Tribunal in terms of conditions laid down under clause 64 of GCC, within the time limit specified there on, failing which I would constrained to seek justice in the appropriate court of law" (sic).

3. Clause 64 of the Indian Railways Standard General Conditions of Contract, as it stood at the time that the parties entered into the agreement of 2014 pertaining to construction of certain staff quarters, provided, inter alia, for the manner in which arbitration would be conducted in cases governed by such general conditions. For the present purpose, Clause 64(3)(a)(i) is relevant:

"64(3)(a)(i) - In cases where the total value of all claims in question added together does not exceed Rs.25,00,000/- (rupees twenty five thousand only), the Arbitral Tribunal shall consist of a Sole Arbitrator who shall be a Gazetted Officer of Railway not below JA Grade, nominated by the General Manager. The sole arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by GM."

4. Upon receipt of the demand for arbitration dated August 24, 2017, the railways responded by a letter of September 13, 2017. The two-paragraph letter indicated that the contract was governed by GCC-2014, but the Railway Board had issued a modification to Clause 64 of GCC-2014 to incorporate the amendment brought about in 2015 to the Arbitration and Conciliation Act, 2016. It also referred to the amended term as per modified Clause 64 and informed the respondent that a contractor had a right to waive the applicability of Section 12 (5) of the Act. The second paragraph of the letter dated September 13, 2017 is of some relevance in the present context:

"It is requested that if Arbitration is required under the new Act, the Annexure-XII (as enclosed) may be submitted alongwith your application to GM/CORE/ Allahabad demanding Arbitration as per



new Act 2015. The required information should be received in this office within 05 days without delay."

5. The respondent replied to the letter of September 13, 2017 with remarkable alacrity. The respondent referred to the relevant letter and asserted, inter alia, as follows:

"... We opt to continue to be governed under the existing agreement, i.e prior to the amendments by the Railway board with regard to the Arbitration and Conciliation Act, and under the provisions of GCC2014. Hence the submission of Annexing XII, enclosed in your letter is dispensed with. As such the sole Arbitrator may be appointed at the earliest."

6. The appointment was made by a letter dated November 13, 2017. Since the value of the claim was about Rs.14 lakh, a Deputy Chief Engineer of the Railway Electrification Department in Chennai was nominated as the sole arbitrator.

7. The appellant refers to the minutes of the arbitral proceedings held on May 16, 2018 that had been signed on behalf of the respondent. The arbitrator recorded towards the end of the minutes and on the same page which bears the signature on behalf of the respondent that the claimant in the reference (the respondent herein) had stated that the "arbitration proceedings have been conducted in a fair manner and sufficient opportunity has been given to them ...". The appellant complains that even during the course of the arbitral reference, the respondent did not object to the sole arbitrator continuing with the reference despite being aware of the arbitrator's status as an employee of the railways. The appellant submits that the appointment was also not challenged by way of Section 14 of the Act, as is now regarded to be possible in view of the de jure inability on account of any of the grounds indicated in the Seventh Schedule to the amended Act of 1996, by virtue of Section 12(5) of the Amended Act.

8. The appellant says that though a ground had been taken in the petition under Section 34 of the Act to the effect that a railway employee was disqualified from donning the role of arbitrator by operation of law, the argument in course of the hearing before the arbitration court was primarily on merits, even though no affidavit had been called for. The appellant points out that in course of the hearing before the arbitration court, it was duly pointed out on behalf of the appellant herein that no attempt had been made by the respondent herein to challenge the appointment of the arbitrator, nor had the respondent herein applied under Section 13(2) of the Act. Such



submission is attributed to the appellant herein at paragraph 8 of the impugned judgment.

9. The respondent asserts that the entire matter, till the arbitral award was rendered, was conducted by a partner of the respondent and without any lawyer being involved in the process. The respondent claims that the pre-appointment correspondence exchanged between the parties must be seen in such context and as to whether the respondent expressly waived the right to object to the appointment has to be assessed from the point of view of a lay person rather than as a trained person would read the relevant letters issued by the railways. The respondent maintains that if the law prohibits a certain thing, it cannot be done; and, if the statute confers a right of waiver with certain conditions attached, the conditions must be strictly enforced for the waiver to fall into place.

10. According to the respondent, the waiver in terms of the Proviso to Section 12(5) of the Act would have to be express and it should not be such as may be gathered from the general sense or as may be gleaned out from a series of documents. The effort on the part of the respondent is to make a distinction between express waiver and implied waiver. To a certain extent, the respondent is justified, just as the first judgment cited on behalf of the respondent refers to the distinction between express and implied promise while discussing Section 12(5) of the Act. But it is the relevant provision which must be noticed first. Since Section 12(5) may be considered as a stand-alone provision and distinct from the preceding provisions of the Section, only such part may be noticed.

"12. Grounds for challenge.-

...

(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator: Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."

11. The respondent first refers to a judgment reported at (2019) 5 SCC 755 (Bharat Broadband Network Ltd v. United Telecoms Ltd) and reads paragraphs 14, 15, 17 and 20 from the report. It is evident from such judgment that the special right conferred by Section 12(5) of the Act has been given exalted status as against the preceding provisions in the Section, so much so that a perceived violation of such right is seen to confer a right to straight-away invoke Section 14 of the Act for



the de jure termination of the mandate since any disqualification in terms of the Seventh Schedule to the Act, which is relatable to Section 12(5) of the Act, would be a legal infirmity and cannot otherwise be condoned. Paragraph 20 of the report dwells on the expression "express agreement in writing" contained in the Proviso to Section 12(5) of the Act. While observing that an express agreement must be one which is specific and apparent as opposed to something which is implied, the judgment does instruct a strict construction of the waiver that is possible under the relevant Proviso. What may not be missed about the judgment is that there was no agreement or any correspondence that had been exchanged between the parties thereto subsequent to the disputes having arisen and prior to the appointment of the disqualified arbitrator.

12. A further judgment reported at (2021) 3 SCC 103 (Haryana Space Application Centre v. Pan India Consultants (P) Ltd) has been brought for a sentence at paragraph 18 of the report to the effect that the provision was mandatory and non-derogable. However, the discussion in the preceding paragraphs of the report pertains to the award in that case not being rendered within reasonable time.

13. Another judgment, reported at (2020) 14 SCC 712 (Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV)), has been placed to show as to how Clause 64, as it originally stood in the general conditions of 2014, was subsequently modified and contractors were advised to enter into an express agreement if they agree to waive the objection. The respondent says that no such opportunity was given to the respondent in the present case.

14. Section 12(5) of the Act is couched in absolute words and there is no escape therefrom except for the statutory exception recognised in the Proviso thereto. The substance of the Proviso is that an express agreement in writing, which has to pertain to the waiver of the applicability of the sub-section and which express agreement in writing, must happen at a time subsequent to the disputes having arisen between the parties to the arbitration agreement. A strict construction of such provision would imply that there would have to be an express agreement in writing; that such express agreement in writing would unequivocally waive the applicability of the relevant sub-section; and, such express agreement in writing must have been executed at a time subsequent to the disputes having arisen. All three conditions must be complied with for the waiver to take effect and a party to the arbitral agreement be seen to have waived the legal disqualification indicated in the sub-section.



15. In the present case, upon the respondent invoking the arbitration agreement and demanding the appointment of an arbitrator, the respondent was advised by the appellant of the 2015 amendment and of original Clause 64 of the 2014 general conditions having been modified. To boot, Annexure XII, a form of waiver, was appended to the letter dated September 13, 2017 issued in reply to the respondent's demand for an arbitral reference.

16. Again, the respondent's reply thereto was clear and unequivocal. The respondent referred to Clause 64 of GCC-2104 and spurned Annexure XII as it was unnecessary in the context of what was asserted by the respondent in such letter. So that the letter is not misread and what the respondent sought to communicate to the railways is not misinterpreted, the exact words of the respondent have been quoted above.

17. In such circumstances, when the respondent was made aware of the amendment to the statute, and even his right to come out of the appointment procedure as recognised in old Clause 64 of GCC-2014, the respondent's clear acceptance of GCC-2014 in response and his reference to Annexure XII being unnecessary would amount to an express agreement in writing of the kind contemplated in the Proviso to Section 12(5) of the Act. All three conditions are met.

18. An implied waiver would be when the surrounding circumstances indicate that the person waiving a right was generally aware or ought to have been aware or may be reasonably seen to be aware and consciously take a decision in such regard. Express waiver, on the other hand, would arise when the right is specifically brought to the notice of the person, he responds thereto and such response reveals his awareness of his right; and, finally, the conscious relinquishment of the known right.

19. The expression, "express agreement in writing" cannot be confined to only a legal document which would be signed by two parties and the person waiving the right would include words "as I hereby expressly waive ..." or the like. Just as an agreement - including an arbitration agreement, no less - can be culled out from a series of correspondence or letters exchanged between the parties, an express agreement in writing within the meaning of the relevant expression in the Proviso may also be found from a series of letters exchanged between the parties to the arbitration agreement. As long as the three conditions germane to the relevant Proviso are complied with and a conscious decision on the part of the party waiving the right is evident, it suffices.



20. For the reasons aforesaid, the specious ground carried in the petition under Section 34 of the Act pertaining to the disqualification of the arbitrator in his very appointment, was not available to the respondent herein as the respondent had waived the applicability of Section 12(5) of the Act in course of the correspondence exchanged between the parties in September, 2017, subsequent to the demand for an arbitral reference and prior to the appointment of the sole arbitrator being made.

21. In the light of the above, the judgment and order impugned dated February 10, 2020 cannot be sustained since it dwelt only on the ground of disqualification of the arbitrator to be appointed. As such, the impugned judgment and order are set aside. However, since the challenge on the merits of the arbitral award, to the extent permissible, was not addressed in the judgment and order impugned, the matter is remanded for a fresh consideration limited to other permissible grounds, except any ground pertaining to the disqualification of the sole arbitrator in terms of Section 12(5) of the Act.

22. For the respondent flogging a dead horse, the respondent will pay costs of Rs.2,500/- (Rupees two thousand five hundred only) to a charity of the respondent's choice within a fortnight from date. The execution and implementation of the costs part of this order will be left to the respondent alone. Further costs have not been imposed in view of the moderate quantum of the claim which was carried to the tribunal and the rejection of such claim by the arbitral tribunal.

23. O.S.A.No.119 of 2021 is disposed of. CMP No.5366 of 2021 is closed.

Sd/-

Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

kpl

To:

The Sub Assistant Registrar
Original Side
High Court, Madras.



Copy to:

Mr.V.K.Manoharan, Sole Arbitrator,
Deputy Chief Engineer
Railway Electrification,
1st Floor, Parcel Office Building,
Railway Station, Kannur 670 001.

+lcc to Mr.P.T.Ramkumar, Advocate SR.No. 39869

+lcc to Mr.J.Rishikesh, Advocate SR.No. 39893

O.S.A.No.119 of 2021
& CMP.NO.5366 of 2021

AJS (CO)

A.SK(27.09.2021)