

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**CM-2117-CII-2021, CM-2119-CII-2021 &
CM-2121-CII-2021 in ARB-61-2020(O&M)
Date of Decision: March 01, 2021**

M/S. J AND K PROJECT CONSTRUCTION CORPORATION LTD.

..... PETITIONER(s)

Versus

GENERAL MANAGER, NORTHERN RAILWAYS AND ANOTHER

..... RESPONDENT(s)

CORAM:- HON'BLE MRS.JUSTICE LISA GILL

Present: Mr. Rahul Dev Singh, Advocate and
Ms. Geetika Kapur, Advocate
for the petitioner.

Mr. Rajiv Sharma, Advocate
for the respondents.

LISA GILL, J.

This matter is being taken up for hearing through video conferencing due to the outbreak of pandemic, COVID-19.

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For the reasons mentioned in the applications, duly supported by affidavits of the applicant, same are allowed as prayed for. Reply alongwith Annexures R/1 to R/8 are taken on record, subject to just exceptions.

Applications are accordingly disposed of.

MAIN CASE:-

This petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short 'Act') seeking appointment of a sole Arbitrator to decide the disputes pending between the parties.

Admittedly, contract dated 31.10.2003 was executed between the parties in respect to 'blanketing with river bed material from Chakki river and earthwork in formation and in embankment and in cutting including mechanical compaction and construction of minor bridges of RCC boxes, RCC slabs, hume pipes and other allied works between Cholang (excluding) to Mukerian (Excluding) in connection with doubling of Jalandhar Cantt.-Pathankot-Jammu section'.

Clause 64(1)(i) of the contract provides for demand for arbitration. As per Clause 64.7 of the contract, it is specifically mentioned that subject to the provisions of the aforesaid Arbitration and Conciliation Act, 1996 and the Rules there under and any statutory modification thereof shall apply to the arbitration proceedings under the clause.

Clause 64(3)(a)(ii) and 64(3)(a)(iii) of the contract read as under:-

“Clause 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 Rly. 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 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.

Clause 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 vacates his/their office/offices or is/are unable to 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).”

A dispute admittedly arose between the petitioner and the Railways and respondent no.1. The contract was rescinded by the respondents and bank guarantee submitted by the Corporation was encashed. Civil Writ Petition No. 13693 of 2004 was filed before this Court, which was disposed of on 12.03.2013 with liberty to the petitioner to invoke arbitration proceedings. In the interregnum the work in question was allotted to another entity. An Arbitral Tribunal consisting of a panel of 3 Gazetted Officers was constituted and during course of proceedings, the Tribunal was re-constituted.

Petitioner filed a petition under Section 14 read with Section 15 of the Arbitration and Conciliation Act, 1996, seeking a declaration that mandate of the Arbitral Tribunal comprising of Presiding Arbitrator, Executive Director and G.M. Finance stood terminated. Learned Addl. District Judge, Hoshiarpur, vide order dated 09.10.2019 allowed the petition filed by the petitioner and declared that the Arbitral Tribunal has de-jure been rendered unable to perform its functions. Civil Revision No. 2274 of 2020 was filed by the respondents. Said revision petition has admittedly been dismissed on 05.02.2021 while observing as under:-

“In the light of the foregoing discussion mere claim of the petitioners that respondents has consented to this arrangement does not in any manner departs the party from raking up such a plea and that too in the absence of any substantial evidence of this especially throughout arbitral proceedings with consent. There has been numerous changes in the composition of the Arbitral Tribunal is another distressing feature which puts a big question mark over the credibility of the Tribunal. It has been rightly held in the impugned findings by the Courts below that since Arbitral Tribunal has been reconstituted, the provisions of the Amended Act would certainly apply and holds good and there is no illegality or infirmity in these findings to that effect and that the Arbitrators who were employees of the railways had become de-jure ineligible to be appointed as Arbitrators nor they could act so.

There being no merit in the present petition, the same stands dismissed.”

Learned counsel for the respondents is unable to deny that in view of decision of Hon'ble Supreme Court in *M/s. Deep Industries Pvt. Ltd. Vs. Oil and Natural Gas Corporation Ltd. and another, Civil Appeal No.9106-2019* and *Bharat Broadband Network Ltd. Vs. United Telecom Ltd. 2019(5) RCR (Civil) 388*, it is not possible for the parties or its official to act as an Arbitrator or to unilaterally nominate the Arbitrator.

Keeping in view the facts and circumstances of the case, prayer addressed in the petition is justified. Accordingly, Mr. Justice Mukul Mudgal, former Chief Justice (retired) of Punjab and Haryana High Court, resident of A-1, 2nd Floor, Nizammudin East, New Delhi, is appointed as the Sole Arbitrator. However, such appointment would be subject to the declaration to be made by the Arbitrator under Section 12 of the Act with regard to his independence and impartiality to settle the disputes between the parties.

The Arbitrator to complete the proceedings within the time limit specified under Section 29-A of the Act. Arbitral fee shall be as per the Fourth schedule of the Act, to be borne equally by the parties. Venue of the Arbitration shall be at Delhi or any other place convenient to the Sole Arbitrator.

Parties to appear before the Sole Arbitrator on such date and time as nominated by him. Proceedings may also be conducted through video conferencing subject to consensus among all.

Petition is accordingly disposed of.

01.03.2021

Sunil

(LISA GILL)
JUDGE

Whether speaking/reasoned:

Yes/No

Whether reportable:

Yes/No