

In the High Court of Punjab and Haryana, at Chandigarh

1. Arbitration Case No. 106 of 2020 (O&M)

M/s Wonder Laminates Private Limited

... Petitioner(s)

Versus

Rail Coach Factory, Kapurthala and Another

... Respondent(s)

AND

2. Arbitration Case No. 107 of 2020 (O&M)

M/s Wonder Laminates Private Limited

... Petitioner(s)

Versus

Rail Coach Factory, Kapurthala and Another

... Respondent(s)

Date of Decision: 15.02.2021

CORAM: Hon'ble Mr. Justice Anil Kshetarpal.

Present: Ms. Kanwal S. Walia, Advocate
for the petitioner(s).

Mr. Sanjiv Ghai, Advocate
for the respondents.

Anil Kshetarpal, J.

By this order, two petitions under Section 11(6) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as “the 1996 Act”), arising between the same parties with respect to identical disputes, shall stand decided. Learned counsel for the parties have also submitted that these two petitions can be disposed of by a common order.

The agreements containing arbitration clause are not in dispute.

Clause 2.21, reads as under:-

“2.21. Arbitration Clause:

2.21.1(a)(i) *In the event of any dispute or difference of opinion between the Rail Coach Factory administration and Contractor(s) as to respective right and obligation of the parties hereunder or of onus to the true intent and meaning of these present and of any articles of conditions thereof such dispute of difference of opinion (except the matter regarding which the decision has been specifically provided for in the terms of the contract) shall be referred to the sole arbitration. Arbitrator shall be a person possessing qualification aid down in Para 2.21.1(a)(ii) and shall be appointed by the General Manager in the case of contracts entered into by Rail Coach Factory, Kapurthala.*

2.21.1(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.

2.21.1(a)(iii) *An Arbitrator may be appointed notwithstanding the total no. of arbitration cases in which he has been appointed in the past. Retire 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.

2.21.1(a)(iv) *The award of the Arbitrator shall be final and binding on the parties to this contract.*

2.21.1(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.*

2.21.1(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.*

2.21.1(d)(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 Conciliation (Amendment) Act, 2015. The cost shall inter-alia*

include fee payable to the Arbitrator would be governed by instruction issued on the subject by Railway Board from time to time irrespective of the fact whether the Arbitrator is appointed by the Railway administration under this clause or by any court of law unless specifically directed by Hon'ble court otherwise on the matter.

2.21.1(d)(ii) *Arbitrator shall be entitled to 50 percent extra fee, if award is made within 6 months in terms of provision contained in section 29(A) (2) of the Arbitration and Conciliation Act, 1996 as amended by Arbitration and Conciliation (Amendment) Act, 2015.*

Besides above, Arbitrator shall also be entitled for this extra fee, in cases, where Fast Track Procedure in terms of section 29(B) of the Arbitration and Conciliation (Amendment) Act, 2015 is followed.

2.21.1(e) *Subject as aforesaid, the Arbitration and Conciliation (Amendment) Act, 2015 and the fulrs there under and any statutory modifications thereof for the time being in force shall be deemed to apply to the arbitration proceedings under this clause.*

2.21.1(f) *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 in terms of section 20 of the Arbitration and Conciliation Act, 1996, as amended by Arbitration and Conciliation (Amendment) Act, 2015.*

2.21.1(g) *In this clause the authority, to appoint the arbitrator includes, if there be no such authority, the office who is for the time being discharging the functions of the authority, whether in addition to other functions of otherwise.*

2.21.1(h) *It is further a term of this contract that where the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made in terms of Section 31(7)(a) of the Arbitration and Conciliation Act, 1996, as amended by Arbitration and Conciliation (Amendment) Act, 2015.*

2.21.1. Pre-Arbitration Meetings:

To avoid the cumbersome & time consuming process of arbitration, pre-arbitration meeting with the contractors can be held for settlement of claim of contractors.

However such meeting/discussions shall be without prejudice to

the Railway's interest in the matter. If an understanding is reached between the administration and the contractor, discussions will be recorded indicating the claim admitted to the extent and the claim not admitted and the contractor's no claim certificate taken on that basis. In either case subsequent action shall be proceeded and the residual disputes if any, shall be referred to arbitration in terms of clause/Para 2.21.1 above."

Some facts are required to be noticed. The petitioner is a manufacturer and supplier of laminates. The respondents issued three purchase orders on 15.03.2018, 06.09.2018 and 03.11.2019 to the petitioner for supply HPL sheets. The respondents claim that the HPL sheets as supplied by the petitioner do not conform to the specifications. It is admitted that with respect to first supply order, the HPL sheets have already been used and payment thereof has also been released.

The petitioner claims that it supplied the material after the same was inspected by the M/s RITES Limited. Since a dispute arose, therefore, the petitioner requested for appointment of a sole Arbitrator. The Rail Coach Factory, in its response, sent a panel of four persons with an option to the petitioner to chose two names from the panel. Thereafter, the General Manager was supposed to appoint the sole Arbitrator from one of the two persons selected by the petitioner. Subsequently, Sh. Parmanand Singh (Retired CDE/RCF) was nominated as the Sole Arbitrator by the General Manager of the Rail Coach Factory.

The petitioner has filed this petition for appointment of an

Arbitrator in terms of the Amended Act, which came into force w.e.f. 23.10.2015. It is significant to note that the previous practice of permitting a party to act as an Arbitrator or to nominate an Arbitrator(s) has been abandoned with a view to improve the credibility of the arbitration awards and to remove the doubts on the impartiality of the proceedings. By now, it is well settled that neither the party can act as an Arbitrator nor it can appoint an Arbitrator. A reference in this regard can be made to the judgments passed by the Supreme Court in *TRF Limited v. Energo Engineering Projects Limited (2017) 8 SCC 377* and *Perkins Eastman Architects DPC and Another v. H.S.C.C. (India) Limited (2019) SCOnline Supreme Court 1517*.

This Court has heard learned counsel for the parties and with their able assistance, perused the paper-books.

It may be noted here that on the one hand, learned counsel appearing for the petitioner prays for appointment of an independent Arbitrator by the Court, whereas on the other hand, Sh. Sanjiv Ghai, Advocate, has chosen to contest the petitions. He submits that as per the arbitration agreement, the Arbitrator has already been appointed. He further submits that on reading of Clause 2.21.1 (a)(ii), the sole Arbitrator has to be a retired Railways Officer not below SAG level, three years after his date of retirement who are not disqualified to arbitrate the dispute under the amended Act. He further submits that the petitioner has not followed the procedure, as provided in Clause 2.21.1. He further submits that the petitioner did not come forward for joint inspection of the material supplied,

judgment passed in *Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML(JV) A Joint Venture Company (2019) SCC Online SC 1635* and *Union of India v. Pardeep Vinod Construction Company (2020)2 SCC 464*.

It is significant to note that in *Central Organisation for Railway Electrification (supra)*, the Supreme Court, looking into the facts of the case, ordered that in case of Railways, the Arbitral Tribunal can consist of retired Railways Officers. However, the aforesaid judgment is in the facts of the case and in that case, a three members' Arbitral Tribunal was required to be appointed. It may be noted here that another Bench of equal strength in *Union of India v. Tania Construction Private Limited Special Leave Petition (C) No. 12670 of 2020, decided on 11.01.2021* has doubted its correctness and requested Hon'ble the Chief Justice of India to constitute a larger bench for reconsideration. The order reads as under:-

“Having heard Mr. K.M. Nataraj, learned ASG for sometime, it is clear that on the facts of this case, the judgment of the High Court cannot be faulted with. Accordingly, the Special Leave Petition is dismissed. However, reliance has been placed upon a recent three-Judge Bench decision of this Court delivered on 17.12.2019 in Central Organisation for Railway Electrification vs. M/s ECI-SPIC-SMO-MCML (JV) A Joint Venture Company, 2019 SCC OnLine 1635. We have perused the aforesaid judgment and prima facie disagree with it for the basic reason that once the appointing authority itself is incapacitated from referring the matter to arbitration, it does

not then follow that notwithstanding this yet appointments may be valid depending on the facts of the case.

We therefore request the Hon'ble Chief Justice to constitute a larger Bench to look into the correctness of this judgment.

Pending application stands disposed of".

As regards the second judgment in ***Pardeep Vinod Construction Company (supra)***, it is apparent that in that case, the request for appointment of the Arbitrator was before the amendment came into force and therefore, the amended provisions were not applicable in view of Section 21 of the 1996 Act.

As regards the second objection, it may be noted that on careful reading of Clause 2.21.1, it is apparent that pre-arbitration meetings are not mandatory or a pre-condition for appointment of the sole Arbitrator. It has been provided that the pre-arbitration meetings with the contractors can be held for settlement of the claim of contractors. In view thereof, it would not be appropriate to hold that the stage for invoking arbitration clause has not arisen. Still further, the respondents have already nominated the sole Arbitrator.

Next contention of learned counsel for the respondents with respect to the effect of failure of the petitioner to come forward for joint inspection, can be examined by the Arbitrator.

In view of the aforesaid discussion, this court is required to nominate a sole Arbitrator.

From the reading of the qualification of the Arbitrator, as

prescribed in Clause 2.21.1(a)(ii) of the bid document, it is apparent that no specific qualification has been prescribed except that the Arbitrator shall be a retired Railways Officer, not below the SAG level three years after his retirement. It is not provided that the Arbitrator shall be required to have some specific qualifications. Still further, it is for the parties to lead evidence. The dispute, in the present case, does not appear to be of a nature which cannot be decided by a Judge.

Keeping in view the aforesaid facts, both the petitions are allowed. This Court is required to exercise its power under Section 11 and nominate the sole arbitrator to decide the disputes and differences between the parties.

(a) Appointment of Arbitrator: Honb'ble Mrs. Justice Rekha Mittal, Former Judge of this Court, is hereby nominated to act as the Sole Arbitrator to decide the disputes and differences between the parties in both the petitions.

(b) Communication to Arbitrator of this order:

(i) A copy of this order will be communicated to the learned Sole Arbitrator by the learned counsel for the petitioner within one week from the date of order being uploaded.

(ii) In addition, within one week of this order being uploaded, the Registry will forward an ordinary copy of this order to the learned Sole Arbitrator at the following postal address:

Arbitrator : Hon'ble Mrs. Justice Rekha Mittal, Former Judge, Punjab and Haryana High Court.

Address : House No. 56, Sector 11-A, Chandigarh.

Mobile No. : +91 8558809903

(c) Disclosure: The learned Sole Arbitrator is requested to forward her statement of disclosure under Section 11(8) read with Section 12(1) of the Arbitration Act, 1996 to the Registrar General of this Court, referencing this arbitration petition, as soon as possible, and in any case, sufficiently in advance of her entering upon the reference to her arbitration. That statement will be retained by the Registrar General on the file of this application. Copies will be given to both sides.

(d) Appearance before the Arbitrator: The parties will appear before the learned Sole Arbitrator physically or through video conferencing on such date and at such place as she nominates and will obtain appropriate directions in regard to fixing a schedule for completing the pleadings, etc.

(e) Contact/communication information of the parties: Contact and communication particulars are to be provided by both sides to the learned Sole Arbitrator within one week of this order being uploaded. The information is to include a valid and functional email

address.

- (f) Application under Section 16:** Liberty to either side to file an application before the learned Sole Arbitrator under Section 16 in regard to any matter or claim and its arbitrability, jurisdiction and competency of the arbitral tribunal.
- (g) Interim Application(s):**
 - (i)** Liberty to both the parties to make an interim application or interim applications including (but not limited to) an interim application under Section 17 of the Arbitration & Conciliation Act, 1996 before the learned Sole Arbitrator
 - (ii)** Any such application will be decided in such manner and within such time as the learned Sole Arbitrator deems fit.
- (h) Fees:** The fees of Arbitral Tribunal shall be governed by IVth Schedule of the Arbitration and Conciliation Act, 1996.
- (i) Sharing of costs and fees:** Parties agree that all arbitral costs and the fees of the arbitrator will be borne by both sides in equal shares at the first instance.
- (j) Venue and seat of arbitration:** The venue of arbitration shall be at such place or places as may be fixed by the Sole Arbitrator in her sole discretion.
- (k) Contentions kept open.** All contentions before the

learned Sole Arbitrator are specifically kept open.

It is clarified that it is open to the respondents to file a counter-claim, if so advised, before the learned Sole Arbitrator, within such time and subject to such terms as the learned Sole Arbitrator may direct.

Costs of the arbitration petitions may be included by both the sides in their claims before the learned Sole Arbitrator.

The miscellaneous application(s) pending in both the petitions, if any, shall also stand disposed of.

**(Anil Kshetarpal)
Judge**

**February 15, 2021
“DK”**

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No