

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

CR 2274 of 2020 (O&M)

Date of Decision: February 05, 2021

General Manager, Northern Railways and another ...Petitioners
Versus
M/s J & K Projects Construction Corporation Ltd.
... Respondent

CORAM : HON'BLE MR. JUSTICE FATEH DEEP SINGH

Present : Mr. Rajiv Sharma, Advocate
for the petitioners.

Mr Rahul Dev Singh, Advocate
for the respondent.

FATEH DEEP SINGH, J. (Oral)

The matter has been taken up through
video-conferencing on account of lockdown due to outbreak of
pandemic COVID-19.

M/s J & K Project Construction Corporation Limited
(petitioner before the Court below, in short '**the Corporation**') is
a Company incorporated under the Jammu and Kashmir

Companies Act 1977 and is primarily carrying on business of execution of civil works. The Northern Railways (respondents before the Court below, in short '**the Railways**') with Head Quarters at New Delhi flouted tenders for inviting applications in regard to blanketing with river bed material from Chakki river and earthwork in formation, embankment and cutting including mechanical compaction and construction of minor bridges of RCC boxes, RCC slabs, hume pipes and other allied works between Cholang to Mukerian to facilitate doubling Jalandhar Cantt-Pathankot-Jammu Section of the Railways.

In pursuance of this, a written contract was executed between the parties on 26.02.2004. It is worthwhile to mention here that respondents have enacted through its Engineering Department Works Hand Book enumerating the regulations of tenders/contracts as well as general conditions of the contract. Under the same, by way of Clause 64(7) provides for appointment of Arbitrator in case of any dispute arising out of such contract, which would be governed by the provisions of

Arbitration and Conciliation Act 1996 and Rules (in short '**the Act**') framed thereunder. Further with the stipulation that any statutory modification thereof shall apply to the Arbitral proceedings by way of this clause.

During the course of time, a dispute arose between the Corporation and the Railways. As a consequence of which it is alleged that the Railways rescinded the contract and encashed the bank guarantee of the Corporation. As the history of the litigation between the parties goes, the Corporation filed a civil writ petition before this Court which stood disposed off vide order dated 12.03.2013 with the liberty to the Corporation to invoke the arbitration proceedings in view of the general conditions of contract. It is in between the railways are alleged to have allotted the work to another party which stands completed. Under clause 64(3)(a)(ii), the Arbitral Tribunal consisting of panel of three gazetted railways officers was constituted and during the course of proceedings vide proceedings dated 25.10.2017, the Railways re-constituted

Arbitral Tribunal and appointed Shri S.K. Mishra, Presiding Arbitrator being Chief Engineer, Shri Rajesh Aggarwal, Executive Director, Ex. Chief Engineer and Ms. Preeti Jha, General Manager, FA & CAO/Traffic, Northern Railway.

Aggrieved over the manner of the Arbitral Tribunal's proceedings, the Corporation filed a petition under Section 14 read with Section 15 the Act seeking declaration that mandate of the Arbitral Tribunal by virtue of its constituents stands terminated in respect of dispute between the parties in the light of this contract and, thus, sought setting aside of all the proceeding orders by the Arbitral Tribunal in relation to this contract between the parties for holding that the Arbitral Tribunal is *de-jure* and *de-facto* unable to perform its functions.

Upon due process the Court of learned Additional District Judge Hoshiarpur vide impugned orders dated 09.10.19 allowed the application of the Corporation and further that Arbitral Tribunal *de-jure* is rendered unable to perform its functions. It is in the light of this order, the Railways has come in

this revision petition by invocation of Article 227 of the Constitution of India for setting aside of this order of the Court below (Annexure P-8) as well as seeking any other orders/directions by this Court, in the interest of justice.

Heard Mr. Rajiv Sharma, Advocate for the petitioners and Mr. Rahul Dev Singh, Advocate for the respondent and perused the records.

It is well writ large on the records and is too fairly conceded to at bar by Mr. Rajiv Sharma, learned counsel for the petitioners/Railways that Shri S.K. Mishra who happens to be an employee of the railways (the petitioners in this case) was designated as Presiding Arbitrator on 25.10.2017. Section 12 of the Act, which lays down the grounds for challenge was amended w.e.f. 23.10.2015 and had brought about changes whereby appointment of an Arbitrator could be challenged on account of non-disclosure of the facts and the provisions is reproduced as below to lay emphasis:-

Section 12. Grounds for challenge.

1[(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,—

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

(b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1.—The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.—The disclosure shall be made by such person in the form specified in the Sixth Schedule.]

(3) An arbitrator may be challenged only if—

(a) circumstances exist that give rise to justifiable doubts as to his independence or impartiality, or

(b) he does not possess the qualifications agreed to by the parties.

(4) A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

2[(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.]

Under these Schedules Fifth and Seventh of the Act, further illustrates the grounds which give rise to justifiable doubts as to the independence or impartiality of the Arbitrator or Arbitrator's relationship with the parties or counsel. It is clearly

established beyond doubt and is even otherwise not assailed by the counsel for the petitioners that Sh. S.K. Mishra Presiding Arbitrator of the Arbitral Tribunal happens to be a senior functionary of the railways. Since the amendment has been brought about way back in October 2015 and the orders of appointment of Mr. S.K. Mishra as Presiding Arbitrator was made subsequent thereto on 25.10.2017, therefore, the amendment having been enforced as on that day, the Arbitral Tribunal certainly fell within the domain and application of the amendment to Section 12. By virtue of Section 14 which too stood amended w.e.f. 23.10.2015 by way of sub-Section 2 provides that if a controversy arises may apply to the Court to decide on the termination of the mandate. It is by virtue of these provisions and that of Section 15 termination of this mandate and substitution of Arbitrator has come about. Since, it is there on the records and is even otherwise not displaced by counsel for the two sides, the works subject matter of the contract stands accomplished by a third party, therefore, does not

necessitates appointment of another Arbitrator.

Learned counsel for the petitioner has sought to seek support from **M/s. I.T.I. Ltd. Vs. M/s Siemens Public Communications Network Ltd.** 2003(1) R.C.R. (Civil) 745, **Civil Appeal No. 9106 of 2019, M/S Deep Industries Limited Vs. Oil and Natural Gas Corporation Limited and another, M/s Madhav Structural Engineering Ltd. and another Vs. The Maharashtra State Road Development Corporation Limited, Review Petition (ST) No. 16618 of 2010, Union of India Vs. Pradeep Vinod Construction Company, Civil Appeal No. 6400 of 2016** and Mr. Rahul Dev Singh, learned counsel for the respondent has placed reliance on **Bharat Broadband Network Limited Vs. United Telecoms Limited, Civil Appeal No. 3972 of 2019, Fuerst Day Lawson Vs. Jindal Exports Ltd.** 2011(3) ArbILR 82, **HRD Corporation (Marcus Oil and Chemical Division) Vs. Gail (India) Limited (formerly Gas Authority of India Ltd.) Civil Appeal No. 11126 of 2017, Omaxe Infrastructure and Construction Ltd. Vs. Union of**

India and another, O.M.P. (T) (COMM.) 9/2018 and IA 1254 of 2018, Ashiana Infrahomes Pvt. Ltd. and others Vs. Adani Power Ltd. 2018(3) ArbiLR 270 and West Haryana Highways Projects Pvt. Ltd. Vs. National Highways Authority of India, 2017(4) ArbiLR 86.

The ratios cited by the learned counsel for the petitioners factually are at much variance from the present dispute and citations cited on behalf of the respondent certainly advance their case on account factual affinity.

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 re-constituted, 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.

February 05, 2021
amit rana

(FATEH DEEP SINGH)
JUDGE

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