

OCD-5

ORDER SHEET
IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
(Commercial Division)

AP/637/2023

RAJPATH CONTRACTORS AND ENGINEERS LTD
VS
UNION OF INDIA AND ANR.

BEFORE:

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

Date : 6th October, 2023.

Appearance:

Mr. Priyankar Saha, Adv.

Ms. Srijani Mukherjee, Adv.

... for the petitioner

Mr. Rudraman Bhattacharya, Adv.

Mr. S.K. Tiwari, Adv.

...for the respondents

The Court:- This is an application for appointment of an arbitral tribunal.

The respondents do not dispute that the parties have an existing dispute arising out of an Agreement dated 5th January, 2009, which is a works contract and contains an arbitration clause. The arbitration clause at Clause 25 of the Agreement specifies that the disputes and differences arising out of the contract will be dealt with under Clauses 63–64(7) of the GCC-2001. The respondent is the Eastern Railway and the petitioner was engaged as a contractor for construction of a bridge over river Brahmani from Howrah on UP & DN lines in between Swadinpur and Nalhati Station in Rampurhat-Barharwa Section of Eastern Railway. The petitioner claims unpaid claims amounting to approximately Rs.38 crores. The petitioner invoked the arbitration agreement by way of a letter dated 24th May, 2023 which also

doubles up as a demand notice for the unpaid dues. The respondent replied to this letter on 31st May, 2023 and did not dispute the arbitration Agreement. The respondent by a further letter dated 28th June, 2023 nominated a panel of gazetted Railway Officers for the petitioner to choose the petitioner's nominee.

The dispute is now on the choice of Arbitrators. The parties place Clause 64(3)(a)(ii) of the GCC which forms the arbitration clause/arbitration Agreement between the parties. Clause 64(3)(a)(ii) will be applicable since the total value of the claims in question exceeds Rs.10 lakhs.

According to learned counsel appearing for the petitioner, the respondent's nomination of gazetted Railway Officers who are presently serving the Eastern Railway is contrary to the law as laid down by the Supreme Court including recent decisions which have been placed before the Court.

Learned counsel appearing for the respondent Eastern Railway argues to the contrary; counsel says that the nomination of serving Officers is covered by the judgment of the Supreme Court in *Central Organization for Railway Electrification vs. ECI-SPIC-SMO-MCML (JV) A Joint Venture Company*, (2020) 14 SCC 712.

The Court's conclusion on considering the judgments shown is this.

In *Central Organization for Railway Electrification*, the Supreme Court considered the intent of Clauses 64(3)(a)(ii) and 64(3)(b) which provide that the Arbitral Tribunal shall consist of a panel of three gazetted Railway Officers and three retired Railway Officers not below the rank of Senior Administrative Grade Officers under the latter clause. The clause in question before this Court is only Clause 64(3)(a)(ii) which provides for three gazetted Railway Officers without going into the retired Railway Officers issue. The Supreme Court held

that the concerned High Court was not justified in appointing an independent Sole Arbitrator ignoring Clause 64(3)(a)(ii) of the GCC and accordingly set aside the order of appointment. The *Central Organization for Railway Electrification* has, however, been considered by the Supreme Court in several subsequent cases, none of which agreed with the ratio of *Central Organization for Railway Electrification*.

The most recent of these cases is *Glock Asia-Pacific Limited vs. Union of India* (2023) 8 SCC 226 where the Supreme Court distinguished *Central Organization* on the facts before it and held that the arbitration clause in *Glock Asia-Pacific Limited* enables a serving employee of the Union of India to nominate a serving employee as a Sole Arbitrator. The Supreme Court further found the said clause to be in conflict with Section 12(5) of the 1996 Act and recorded that the judgment in *Central Organization* has been challenged and referred to a Larger Bench in *Union of India v. Tania Constructions Limited*, 2021 SCC OnLine SC 271 and *JSW Steel Limited vs. South Western Railway*, 2022 SCC OnLine SC 1973.

JSW Steel Limited, in fact, records that the correctness of *Central Organization* was doubted by a subsequent Bench of three Judges. A co-ordinate Bench of this Court in *Amazing India Contractors Pvt. Ltd. vs. Airport Authority of India and Others*, 2023 SCC OnLine Cal 1704, found the decision in *Central Organization* to be in divergence with recent decisions of the Supreme Court.

Although Clause 64(3)(a)(ii) simply says three names of gazetted Railway Officers, going by the trend of the decisions subsequent to *Central Organization for Railway Electrification* and the fact that the *Central Organization for Railway*

Electrification has been referred to a Larger Bench, this Court is not inclined to permit nomination of Arbitrators from the list of four Arbitrators, who are presently serving officers of the Eastern Railway. Since all the officers are serving officers of the Eastern Railway, the bar of Section 12(5) of the 1996 Act read with the Fifth and the Seventh Schedules will squarely apply to the present case. One of the parties to the arbitration cannot have the entire arbitral panel constituted by its officers, that too, by those who are serving the respondents.

This Court is, therefore, of the view that the arbitration petition should be allowed by the Court nominating a panel of three Arbitrators.

AP/637/2023 is, accordingly allowed and disposed of by nominating Ms. Nadira Patherya, former Judge of this Court and Ms. Samapti Chatterjee, former Judge of this Court to be the two Arbitrators and Mr. Bhaskar Bhattacharyya, former Chief Justice of Gujarat High Court as the presiding Arbitrator subject to the learned Arbitrators communicating their consent in the prescribed format to the Registrar, Original Side of this Court within three weeks from date.

The petitioner's advocate-on-record shall communicate this order on the learned Arbitrators by 11th October, 2023 along with the requisite details of the contact person of the petitioner.

(MOUSHUMI BHATTACHARYA, J.)