

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

Present :

Hon'ble Justice Moushumi Bhattacharya

AP 736 of 2023

M/s. Mehrotra Buildcon Pvt. Ltd.

vs

South Eastern Railway

For the petitioner : Mr. Parth Tandon, Adv.

For the respondent : Mr. Siddhartha Lahiri, Adv.
Ms. Amrita Pandey, Adv.

Last heard on : 11.12.2023

Delivered on : 15.12.2023

Moushumi Bhattacharya, J.

1. The petitioner seeks appointment of a sole arbitrator to adjudicate the disputes between the petitioner and the respondent. The prayer is made in an application filed under section 11 of The Arbitration and Conciliation Act, 1996.

2. The material placed before the court shows that the respondent, South Eastern Railway, engaged the petitioner for construction of a foot-over

bridge in Jharsuguda, Odisha. The Notice Inviting Tender specifies that the dispute resolution would be governed by the Standard General Conditions of Contract dated 6.9.2019 for use in connection with works contracts. Disputes arose between the parties with regard to the price variation clause in the NIT. The petitioner sent several notices from 8.9.2021 to 5.8.2022 outlining various grievances of the petitioner and enclosing the petitioner's invoices for the respondent's approval. The petitioner issued a notice to the respondent on 13.1.2023 under Clause 63 of the GCC for conciliation of the disputes pre-arbitration. The petitioner sent a further notice on 28.2.2023 under clause 63.1 of the GCC in the form of a representation for deciding the disputes and differences between the parties on the petitioner's claim for price variation in structural steel in the contract between the parties. The petitioner was finally constrained to invoke the arbitration clause by a notice dated 4.7.2023.

3. The respondent wrote several letters to the petitioner including a letter of 18.8.2023 forwarding 4 names of proposed arbitrators under Clause 64(3)(b)(ii) of the GCC.

4. Learned counsel appearing for the petitioner and the respondent have taken the court through the relevant documents. Counsel have not made any argument on the existence of a dispute between the parties; it is admitted that there are disputes which are required to be adjudicated by an arbitral tribunal.

5. The point which has been argued and falls for decision is whether the parties are bound by Clause 64(3)(b)(ii) of the GCC with regard to the arbitration mechanism provided under the said clause.

6. Clause 64(3)(b)(ii) provides for cases exceeding Rs. 50 lakhs in value (as the present case) and the arbitral tribunal to consist of a panel of 3 retired Railway Officers not below the rank of senior administrative grade officers. The clause further provides that the Railway will send a panel of at least 4 names of retired Railway Officers to the contractor (petitioner in the present case) within 60 days from the day of a valid demand for arbitration being received by the General Manager of the respondent.

7. The above clause forms the pivot of the disputes. While the petitioner urges that the clause would be invalidated in view of the decisions of the Supreme Court and the High Courts on unilateral appointments, the respondent relies on *Central Organisation for Railway Electrification vs. ECI-SPIC-SMO-MCML (JV); (2020) 14 SCC 712* to defend the clause.

8. A 3-judge Bench of the Supreme Court considered the very same clause, namely, clause 64(3)(b) of the GCC in *Central Organisation* to hold that the parties had consented to the conditions in the GCC and the High Court was not justified in appointing an independent sole arbitrator ignoring the said clause. The Supreme Court was of the view that the reason for empanelling retired Railway Officers is to ensure that the dispute is resolved by utilising their expertise as arbitrators. *Central Organisation* was referred to in *Union of India vs. Tania Constructions Limited; 2021 SCC OnLine SC 271* by another 3-judge Bench on 11.1.2021 where the Supreme Court

disagreed with *Central Organisation* and referred the matter to a larger bench to look into the correctness of the decision. The issue again came before the Supreme Court on 17.2.2022 in *Bangalore Metro Rail Corporation Limited vs. JMC ATEPL Joint Venture* where the Supreme Court dwelt on *Central Organisation* as well as *Tantia Constructions* but proceeded, nonetheless, to constitute an arbitral panel in the larger interest of the parties.

9. The petitioner relies on *Tantia Constructions* to say that *Central Organisation* has been doubted by the former. The respondent, on the other hand, relies on *Union Territory of Ladakh vs. Jammu and Kashmir National Conference 2023 SCC OnLine SC 1140* to argue that *Central Organisation* would have precedence over other decision.

10. In *Union Territory of Ladakh* the Supreme Court held that courts should not refuse to follow a judgment on the ground that it has been doubted by a later co-ordinate Bench. The Supreme Court observed that the High Courts should follow the earlier judgment in the case of conflicting decisions by Benches of equal strength of the Supreme Court.

11. The question hence is whether the petitioner would be bound by the dictum in *Union Territory of Ladakh* and consequently Clause 64(3)(b)(ii) of the GCC whereby the petitioner was to choose 2 from the 3 names provided by the respondent and the respondent would thereafter nominate 1 of those 2 names as the petitioner's nominee arbitrator.

12. First, the dictum of the Supreme Court in *Union Territory of Ladakh*.

13. Paragraph 35 of the report makes it clear that the Supreme Court left sufficient room for the particular facts and circumstances of each individual case for the final decision. The facts and circumstances of the present case call for intervention after giving due weightage to the 3-judge Bench decision in *Tantia Constructions* and the later order in *Bangalore Metro Rail Corporation*. For clarification, the order in *Tantia Constructions* was passed on 11.1.2021 referring the point in *Central Organisation* (decided on 17.12.2019) to a larger bench. The Supreme Court came to a similar view on 17.2.2022 in *Bangalore Metro Rail Corporation* and constituted the arbitral tribunal notwithstanding the reference pending before the larger bench.

14. Next, the decision in *Central Organisation*.

15. Although the respondent has placed strong reliance on this judgment where the Supreme Court validated the appointment of a panel of arbitrators by the Railway, there are several significant dissimilarities between the facts in *Central Organisation* and the present case. In that case, the Supreme Court noted that the respondent had filed the application before the Allahabad High Court for appointment of arbitrator without responding to the appellant's request to select 2 arbitrators from the 4 names sent by the appellant. In the present case, the petitioner has given at least 3 letters on 4.7.2023, 15.9.2023 and 18.9.2023 clearly stating that the petitioner is not agreeable to waiving the applicability of section 12(5) of the 1996 Act. To clarify, section 12(5) pertains to ineligibility of an arbitrator under the categories specified in the Seventh Schedule. The proviso to section 12(5) allows for waiving the applicability of section 12(5) by way of

an express agreement in writing. The petitioner made its stand abundantly clear in these letters that the petitioner was not agreeable to the arbitration mechanism provided under clause 64(3)(b)(ii) of the GCC wherein the petitioner would have to nominate 2 from the 4 names sent by the respondent and the respondent would have the final say in appointing one of the 2 names chosen, as the petitioner's nominee in the arbitration. The petitioner also referred to the decision of the Supreme Court on unilateral appointments.

16. The petitioner's letters constitute a significant departure on facts from *Central Organisation*. The petitioner, having expressed its intention to disagree with the arbitration mechanism under the GCC, cannot now be forced into the stranglehold of clause 64(3)(b)(ii).

17. It is necessary to briefly touch on the object of The Arbitration and Conciliation Act, 1996 in this context. The Act firmly rests on the consent of parties, from the stage of choosing the arbitration mechanism to the conduct of the arbitration as also the form and content of an award. The Act envisages complete consensus on all points. Consensual resolution to the dispute through arbitration forms the *leitmotif* of the Act. The Act certainly does not envisage a situation where one of the parties, who has made it clear in no uncertain terms to disagree with the mode of appointment, being bodily-bundled, kicking and screaming, to arbitration in utter disregard to the lack of consent.

18. The unilaterality of the clause in question adds to the Court's view. As stated above, the petitioner was to choose 2 names from the 4 names given

by the respondent. The General Manager of the respondent would thereafter nominate one of those 2 names as the petitioner's nominee in the arbitration proceedings. The clause does not provide for any elbow-room (or leg room for that matter) for the petitioner to make a free choice. The names are simply handed on a platter, the petitioner is to choose 2 and the final choice rests on the GM of the respondent; that too as the petitioner's nominee arbitrator. Nothing can be more one-sided than this. The absence of consent and choice is writ large in clause 64(3)(b)(ii) of the GCC.

19. This was precisely the Supreme Court's view in *Tantia Constructions* where it was observed that an authority, which itself was incapacitated from referring the matter to arbitration, would automatically be precluded from making a valid appointment. The Supreme Court and the High Courts have consistently frowned on unilateral appointments as anathema to section 12(5) of the Act read with the Fifth and the Seventh Schedules. The argument of the mechanism being saved by Entry 31 of the Fifth Schedule in that the arbitrators had retired more than 3 years before their dates of nomination is no defence since there are several other embargoes in that Schedule pertaining to an arbitrator's relationship with one or more of the parties. The decisions of the Supreme Court in *Perkins Eastman Architects DPC vs. HSCC (India) Ltd.*; (2020) 20 SCC 760, *Bharat Broadband Network Limited vs. United Telecoms Limited*; (2019) 5 SCC 755 and *TRF Limited vs. Energo Engineering Projects Limited*; (2017) 8 SCC 377 may be referred to in this context.

20. The facts before the Supreme Court in *Voestalpine Schienen GmbH vs. Delhi Metro Rail Corpn. Ltd.*; (2017) 4 SCC 665 were substantially similar to those in the present case. The Supreme Court opined that the choice given to the opposite party is curtailed since the party is required to choose 1 out of the 5 names which were forwarded by the other side. The Supreme Court further held that there was room for suspicion of the other party picking its favourites. The Supreme Court accordingly recommended that the panel must be made more broadbased to cut back any apprehension of partiality or lack of independence of the arbitrators.

21. *Rajpath Contractors vs. Union of India* delivered by this Court in AP/637/2023 is not relevant since the respondent in that case had proposed to nominate 3 of its serving officers as arbitrators.

22. The above facts, taken together with the law on the subject, persuades the Court to reject the contentions made on behalf of the respondent and appoint an arbitral tribunal of 3 learned arbitrators to adjudicate the disputes between the parties.

23. No one appears for the petitioner at the time of delivery of the judgment.

24. Learned counsel appearing for the respondent submits that the parties are willing to have one Arbitrator to adjudicate the disputes.

25. AP/736/2023 is accordingly allowed and disposed of by appointing Mr. Ranjit Kumar Bag (Mob No. – 8335073594/9433898375) former Judge of this Court to act as the Arbitrator subject to the learned Arbitrator

communicating his consent in the prescribed format to the Registrar, Original Side of this Court within three weeks from date.

26. The petitioner's advocate-on-record shall communicate this order on the learned Arbitrator by 19th December 2023 along with the requisite details of the contact person of the petitioner.

27. AP 736 of 2023 is disposed of in terms of the above.

Urgent Photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)