

OCD-2

ORDER SHEET

AP/784/2022

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

RAITANI ENGINEERING WORKS PVT. LTD.
VS
UNION OF INDIA AND ANR.

BEFORE:

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

Date : 18th December, 2023.

Appearance:

Mr. Rachit Lakhmani, Adv.

Mr. Avishek Das, Adv.

..for the petitioner

Mr. P. K. Drolia, Adv.

Mr. Santosh Kr. Pandey, Adv.

..for the respondent UOI

The Court: The dispute between the parties arises out of a Memorandum of Agreement dated 14th May, 2018 by which the petitioner was engaged as the successful contractor for doing construction works in the Tarakeswar-Howrah line of the Eastern Railway. The dispute is with regard to the petitioner's unpaid bills which as of March and August, 2022 amounted to approximately Rs.3.97 crores. The petitioner claims much more as of today.

The petitioner's complaint also relates to a notice of termination dated 9th July, 2021 whereby the respondent Railway terminated the contract on account

of delay. The petitioner says that the delay was caused by reason of the inaction on the part of the Railway.

Learned counsel appearing for the respondent Railway is not opposed to the Court appointing an arbitrator to adjudicate on the dispute but insists that the Railway should be given a choice in the matter.

The Court is not inclined to accept the submission on behalf of the respondent in view of the numerous judgments of the Supreme Court on unilateral appointments from *TRF Limited vs. Energo Engineering Project Limited* [(2017) 8 SCC 377] to *Perkins Eastman Architects DPC vs. HSCC (India) Ltd.*, (2020) 20 SCC 760. The arbitration clause in the Agreement is governed by the standard General Conditions of Contract, 2014 and Clause 64.3(a)(i) in the present case. The said clause covers cases in excess of Rs.25 lakhs and under Clause (ii), the Railway is to send a panel of more than three names of retired railway officers to work as the Arbitrator. The contractor will then be asked to suggest two names out of the three and the final choice will be on the General Manager of the Railway. Each of the steps is time bound but there is no dispute that the General Manager of Eastern Railway will choose the petitioner's nominee Arbitrator.

This point was considered by this Court in *M/s. Mehrotra Buildcon Pvt. Ltd. vs. South Eastern Railway* (AP 736 of 2023) where a similar clause contained in GCC, 2019 was held to be contrary to the decisions of the Supreme Court. In the present case, the Railway allegedly owes outstanding amounts to the petitioner. Hence the GM of the Eastern Railway having the final say in the

choice of Arbitrators would directly be contrary to Section 12(5) of the 1996 Act read with the Fifth and Seventh Schedules. It is significant that the petitioner refused to waive the applicability of Section 12(5) of the Act by its letter dated 16th August, 2022 despite the Railway repeatedly asking for such including by way of a letter dated 12th May, 2022.

There are also substantial factual differences from the Supreme Court decision in *Central Organisation for Railway Electrification vs. ECI-SPIC-SMO-MCML (JV)*, (2020) 14 SCC 712. In the facts of that case, the respondent before the Supreme Court (petitioner who had filed the Section 11 application) had not responded to the Railway's letters and had also agreed on a person who was an officer of the Railways. The facts before this Court do not contain any such act of waiver on the part of the petitioner. There are at least two decisions of the Supreme Court including in *Tantia Constructions Limited* and *Bangalore Metro Rail Corporation* where the Supreme Court mentioned *Central Organisation* being referred to a Larger Bench.

In any event, the respondent in the present case is not averse to the Court appointing an arbitral panel.

AP/784/2022 is, accordingly, allowed and disposed of by appointing Mr. Mr. Rajratna Sen and Mr. Sudip Deb as Arbitrators and Mr. Asok Kumar Ganguly as the Presiding Arbitrator. The three learned Arbitrators will form the Arbitral Tribunal subject to the learned Arbitrators communicating their consent in the prescribed format to the Registrar, Original Side of this Court within three weeks from today.

The petitioner shall write to the Tribunal with the relevant particulars of the matter.

The petitioner's advocate-on-record shall communicate this order on the learned Arbitrators by 20th December, 2023 along with the requisite details of the contact person of the petitioner.

(MOUSHUMI BHATTACHARYA, J.)

kc.