



Arb.O.P(Com.Div.)No.400 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.11.2023

CORAM :

THE HONOURABLE MR.JUSTICE C.SARAVANAN

Arb.O.P.(Com.Div.)No.400 of 2022

Kottukulam Engineers Pvt.Ltd.,
Represented by its Director,
Shibu Punnen

... Petitioner

VS.

Southern Railway Administration,
Represented by the Principal Chief Engineer,
Park Town, Chennai 600 003.

... Respondent

Prayer: Original Petition is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, praying to appoint an arbitrator to decide the disputes arising out of the Agreement No.CE/3/CS of 2017 dated 17.03.2017 between the petitioner and the respondent.

For Petitioner : Mr.Abishek Jenasenan

For Respondents : Mr.A.R.L.Sundaresan
Additional Solicitor General (ASG)
Assisted by Mr.K.S.Jeyaganeshan
Senior Panel Counsel (SPC)



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ORDER

The petitioner has filed this petition under Section 11(6) of the Arbitration and Conciliation Act, 1996, for appointing Arbitrators in terms of an Agreement entered into between the parties on 17.03.2017.

2. The petitioner was awarded a contract for supply of 2,82,117 numbers of PSC (Pre-Stressed Concrete) line sleepers by the respondent pursuant to a tender floated by the respondent/Southern Railway.

3. Pursuant to the same, a formal contract No.CE/3/CS of 2017 dated 17.03.2017 was also signed between the parties which sets out the terms and conditions of the supply of the PSC sleepers. Supply was to be effected before 08.10.2018. Meanwhile, the respondent/Southern Railway extended the period of supply vide Rider Agreement dated 27.12.2018. Relevant portion of the said Agreement dated 27.12.2018, read as under:-

3. Whereas, the purchaser entered into a formal contract No.CE/3/CS of 2017 dated 17.03.2017 with the contractor on the same terms and conditions of the Railway Board's letter of acceptance dated 29.09./06.10.2016.



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4. Whereas Rider Agreement No.CE/Rider-2/CS of 2018 dated 19.03.2018 was executed with the contractor for amendments on account of introduction of New WPI series 2011-12 from April 2017 and implementation of GST from 01.07.2017.
5. Whereas the Contractor vide his letter dated 05.09.2018 has requested for extension of currency of the contract upto 31.05.2019.
6. Whereas the purchaser has considered the request of the contractor and agreed for extending the delivery period in terms of Clause 10 of the contract upto 08.02.2019, without PVC (restricted upto 08.10.2018), without LD and without DC for the production of balance 47,020 of original quantity, without PVC, with ID & with DC for production of further balance 53,359 sleepers against original quantity. During DP extension period any price variation towards negative side shall be applicable.

4. As per Clause 1.3 of the Agreement No.CE/3/CS/ of 2017 dated 17.03.2017, it has been stated as follows:-

- 1.3.Special conditions of contract, Indian Railway Standard Conditions of Contract, Indian Railways Specifications T-39 for Prestressed Concrete Sleepers pre-tensioned type (Broad Gauge) as amended up to date of tender opening, Schedule of Technical Requirement as stipulated in clause 25 of special condition of contract shall interalia form integral part of the contract.”

A dispute has arisen between the parties. Clause 2900 to Annexure III of



Tender Document of the Indian Railway Standard Conditions of Contract

provides for a mechanism for resolution of dispute through arbitration. It reads

as under:-

2900 Arbitration:

- (a) In the event of any question, dispute or difference arising under these conditions or any special conditions of contract, or in connection with this contract (except as to any matters the decision of which is specially provided for by these or the Special Conditions) the same shall be referred to the sole arbitration of a Gazetted Railway Officer appointed to be the arbitrator, by the General Manager in the case of contracts entered into by the Zonal Railways and production Units; by any Member of the Railway Board, in the case of contracts entered into by the Railway Board and by the head of the Organization in respect of contracts entered into by the other Organizations under the Ministry of Railways. The Gazetted Railway Officer to be 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. The award of the arbitrator shall be final and binding on the parties to this contract.
- (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.

- © 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.
- (d) The arbitrator may from time to time with the consent of all the parties to the contract enlarge the time for making the award.
- (e) Upon every and any such reference the assessment of the cost incidental to the reference and award respectively shall be in the discretion of the arbitrator.
- (f) Subject as aforesaid, the Arbitration and Conciliation Act, 1996 and the rules 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.
- (g) 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.
- (h) In this clause the authority to appoint the arbitrator includes, if there be no such authority, the officer who is for the time being discharging the functions' of that authority, whether in addition to other functions or otherwise.

5. The Arbitral Tribunal contemplated in terms of the above clause



cannot be countenanced in view of the specific restrictions under Section 12(5)

of the Arbitration and Conciliation Act, 1996 r/w VII Schedule of the Act. The petitioner has invoked the arbitration clause on 11.03.2022 to which, the respondent has responded on 04.04.2022. In the aforesaid letter, the petitioner was asked to approach the General Manager of the Southern Railway. On 06.04.2022, the petitioner therefore issued a notice under Section 21 of the Arbitration and Conciliation Act, 1996. The respondent by a letter dated 08.02.2022 has informed the petitioner as follows:-

With reference to your letter cited above, it is informed that the nomination of Arbitrator has to be carried out as per the extant provisions, whereas you have nominated an arbitrator of your own. The representation of going for arbitration will be considered after obtaining the opinion of the concerned officials and the action will be taken accordingly.

6. By another communication dated 12.07.2022, the petitioner has been informed as follows:-

Further, to the request for Arbitration made by you, the General Manager/Southern Railway, Chennai has furnished the following names of retired officers to the Arbitral Panel viz:

1) Shri Ram Prakash Sharma, Retd.PCEE/CR



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- (DOR: 30.04.2018)
- 2) Shri Jitendra Narayan Lal Das, Retd.PCE/SER
(DOR : 30.01.2019)
 - 3) Shri Sunil Kumar Gupta, Retd.PCME/SWR
(DOR: 31.03.2020)
 - 4) Shri N.S.N.Murthy, Retd. FA&CAO/T/SCR
(DOR: 14.12.2007(VR)]

Your firm is therefore requested to select at least any two officers from the above panel as you choice and intimate the same directly to PCE/MAS(with a copy to this office) within 30 (thirty) days in terms IRSS conditions of contract to proceed further for appointment of an Arbitral Tribunal.

Please convey your choice without fail.

7. The names of the persons informed by the aforesaid communication dated 12.07.2022 is contrary to clause 2900 of the Annexure III of the Tender Document. As per contract only serving employees of the Railways can be nominated / appointed as arbitrators whereas, the respondent has suggested the name of retired employees. An explanation forthcoming at the time of hearing is that the General Conditions of the contract are amended from time to time and therefore the names have been suggested in terms of the aforesaid amendment. It is submitted that the respondent Railway is entitled to appoint retired employees of the Railway as an arbitrator. It is therefore submitted that it was open for the petitioner to send two names from the above mentioned



names for being selected as the nominee arbitrator of the petitioner and thereafter the General Manager will appoint both respondent nominee and presiding arbitrator.

8. In my view, the aforesaid method of appointment of arbitrators cannot be countenanced as per clause 1.3 of the aforesaid contract. The subsequent amendment to the General Conditions of Contract cannot be foisted on the petitioner.

9. That apart, the question of General Manager of the Railways appointing the Presiding Arbitrator also cannot be countenanced.

10. Since the respondent has not acted upon in accordance with the above clause by appointing the arbitrators, it is deemed that the respondent has forfeited his rights for appointing arbitrators. Considering the same, **Mr. Rahul Balaji, Advocate, (Cell No.9840023366) No.8, 8th Street, Dr.Radhakrishnan Salai, Mylapore, Chennai-4,** is appointed as an Arbitrator to enter upon reference and adjudicate/resolve the *inter se* dispute between the parties.

11. The learned Arbitrator appointed herein, shall after issuing notice to



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the parties and upon hearing them, endeavour to complete the arbitral proceedings and pass an award strictly in accordance with the provisions of the Arbitration and Conciliation Act, 1996, as expeditiously as possible, preferably within a period of twelve months after the date of completion of pleadings under Sub-Section 4 to Section 23 as is contemplated in Section 29-A of the Arbitration and Conciliation Act, 1996, without getting influenced by any of the observations made by this Court in this order on merits.

12 The learned Arbitrator appointed herein shall be paid fees and other incidental charges as may be fixed with the consent of parties or in accordance with the provisions of the Arbitration and Conciliation Act, 1996, and the same shall be borne by the parties equally. In case, the respondent remain *ex parte*, the petitioner shall pay the entire fee and other incidental charges to the Arbitrator and later recover the same from the respondent.

13. This Original Petition is allowed accordingly, leaving the parties to bear their own costs.

14. Since this Court has appointed the Arbitrator, it is open to the



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petitioner as well as the respondent to seek other reliefs under Section 17 of the Arbitration and Conciliation Act, 1996, before the learned Arbitrator.

09.11.2023

Index : Yes/No
Internet : Yes/No
Neutral Citation : Yes/No
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To

The Principal Chief Engineer,
Southern Railway Administration,
Park Town, Chennai 600 003.

C.SARAVANAN, J.



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