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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment pronounced on: 01.12.2023

+ **ARB.P. 893/2022**

N.K. SHARMA

..... Petitioner

Through: Mr. Avinash Trivedi, Mr. Anurag
Kaushik and Mr. Jatin Arora, Advs.

versus

THE GENERAL MANAGER NORTHERN RAILWAY

..... Respondent

Through: Mr. Bhagvan Swarup Shukla, CGSC
(through v/c), Mr. Sarvan Kumar,
G.P. and Mr. Arun Kumar, Sr. Den-
III, Mr. Shiv Raj Meena, CLA and
Mr. Pankaj, OS/W-III.

+ **O.M.P.(I) (COMM.) 203/2022 & IA No. 9822/2022**

N.K. SHARMA

..... Petitioner

Through: Mr. Avinash Trivedi, Mr. Anurag
Kaushik and Mr. Jatin Arora, Advs.

versus

NORTHERN RAILWAY

..... Respondent

Through: Mr. Bhagvan Swarup Shukla, CGSC
(through v/c), Mr. Sarvan Kumar,
G.P. and Mr. Arun Kumar, Sr. Den-
III, Mr. Shiv Raj Meena, CLA and
Mr. Pankaj, OS/W-III.

CORAM:

HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT



ARB.P. 893/2022

1. The present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 has been filed seeking appointment of a Sole Arbitrator to adjudicate the disputes between the parties.
2. The disputes between the parties have arisen in the context of a Contract between the petitioner and the respondent for work relating to *“Replacement of Old Washing cum pit line nos. 20 and 21 & building of sewerage disposal arrangement in the section of SSE/W/DLJ under ADEN/DLI”*. The said work was awarded to the petitioner by the respondent vide letter of acceptance bearing No. 128-W/269/120/2018-19/W-III dated 01.09.2018. A formal agreement bearing no. 26-2018-19 dated 28.10.2018 was also entered into between the parties for the work in question. The applicable General Conditions of the Contract (“GCC”) contains an arbitration clause (modified Clause 64) in the following terms:-

“64.(3) (b) : Appointment of Arbitrator where applicability of section 12 (5) of A&C Act has not been waived off : The Arbitral Tribunal shall consist of a Panel of three (3) retired Railway Officer, retired not below the rank of SAG Officer, as the arbitrators. For this purpose, the Railway will send a panel of at least four (4) names of retired Railway Officer(s) empanelled to work as Railway Arbitrator duly indicating their retirement date to the contractor within 60 days from the day when a written and valid demand for arbitration is received by the GM.

Contractor will be asked to suggest General Manager at least 2 names out of the panel for appointment as contractor’s nominee within 30 days from the date of dispatch of the request by Railway. The General Manager shall appoint at least one out of them as the contractor’s nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the ‘presiding arbitrator’ from amongst the 3 arbitrators so appointed. GM shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contractor’s nominees. While nominating the arbitrators, it will be necessary to ensure that one of them has served in the Accounts Department.”



3. Reference would also be apposite to Clause 63 of the applicable General Conditions which is as under:-

“63. Matters finally determined by the Railways: All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract, shall be referred by the contractor to the GM and the GM shall, within 120 days after receipt of the contractor’s representation, make and notify decisions on all matters referred to by the contractor in writing provided that matters for which provision has been made in Clauses 8, 18, 22(5), 39, 43(2), 45(a), 55, 55- A(5), 57, 57A, 61(1), 61(2), and 62(1) to (xiii)(B) of Standard General Conditions of Contract or in any clause of the Special Condition of the Contract shall be deemed as “excepted matters” (matters not arbitrable) and decisions of the Railway authority, thereon shall be final and binding on the contractor; provided further that “excepted matters” shall stand specifically excluded from the purview of the Arbitration clause.”

4. It is contention of the petitioner that after the receipt of letter of acceptance, it had mobilized all its resources, requisite equipments/material/ machineries, T&P, labours etc. with intent to start the work and complete it within the time, however, it is alleged that the respondent did not perform its responsibilities and reciprocal obligations under the agreement which hindered the progress of the work. Consequently, the execution of the work was delayed. A letter dated 24.06.2019 is stated to have been addressed by the petitioner in this regard.

5. The respondent is stated to have issued a notice dated 26.09.2019 under Clause 62 of the GCC stating that it would terminate the contract if the progress of the work was not hastened.

6. Further correspondence ensued between the parties and in the meantime, various time extensions are also stated to have been granted by the respondent to the petitioner.

7. A notice to invoke arbitration as contemplated under Clause 64(1) of



the GCC was sent by the petitioner to the respondent on 01.06.2022 seeking to raise certain claims upon the respondent.

8. Subsequently, a termination notice dated 09.06.2022 was sent by the respondent wherein it was stated that the contract stood rescinded in terms of Clause 62 of the GCC and that the balance work would be carried out independently without the participation of the petitioner.

9. Vide communication dated 17.06.2022, the respondent addressed a communication to the petitioner stating as under:-

“NORTHERN RAILWAY

*Headquarters Office,
Baroda House,
New Delhi*

*No. 63-W/5/1221-WA
Dated: 17.06.2022*

*M/s. N.K. Sharma,
G-134, Near NH-24,
Gazipur Village,
Delhi-110096*

Sub:- Arbitration in connection with: “Replacement of old washing cum pit line no. 20 & 21 and building of sewerage disposal arrangement in the section of SSE/Works/DLI under ADEN/DLI”.

Ref:- (i) Indian Railway Standard General Conditions of Contract, April, 2022 issued under Railway Board's letter No. 2022/CE-I/CT/GCC-2022 Policy dated 27.04.2022.

(ii) M/s. N.K. Sharma , G-134, Near NH-24, Gazipur Village, Delhi-110096 letter No. Nil dated 01.06.2022 received in this office on 16.06.222 addressed to GM/N. Rly. Regarding Appointment of Arbitrator.

In reference to your request for appointment of Arbitrator, the case is under process. As per clause 64(1)(ii)(b) of Indian Railway Standard General Conditions of Contract, April 2022 issued under Railway Board's letter No. 2022/CE-I/CT/GCC-2022 Policy dated 27.04.2022, parties may waive off the applicability of Sub- Section 12(5) of Arbitration & Conciliation Act 2015, if they agree for such waiver in writing, after



dispute having arisen between them, in the format given under Annexure XV of these conditions (format enclosed).

You are therefore, requested to fill up the Annexure-XV, if you agree for waiver of clause 12(5) of Arbitration & Conciliation Act and send it back to this office for appointment of Sole Arbitrator / Arbitral Tribunal consisting of Railway's Gazetted Officer (JAG/SAG) within 30 days from the date of dispatched.

Your reply is urgently requested for early appointment of Arbitrator.

DA: As above

*(Harvinder Singh)
Dy. Chief Engineer/Genl
For General Manager/Engg."*

10. Pursuant thereto, a petition under Section 9 of the Arbitration and Conciliation Act, 1996, being OMP. (I) (COMM.) 203/2022, was filed by the petitioner, in which, an interim order came to be passed restraining the respondent from encashing the Bank Guarantees submitted by the petitioner to the respondent. The said interim order dated 22.06.2022 passed by this Court is as under:-

"1. An application under section 9 of the Arbitration & Conciliation Act, 1996 has been moved with the following prayer :-

"(a) Pass an ex-parte order thereby declaring the termination notice dated 09.06.2022 received on 13.06.2022 as null and void being not in terms of Clause 62 of GCC And/or;

(b) Pass an order thereby restraining the respondent from encashing bank guarantee bearing No. 0216219IPG025262 dated 10.06.2020 of Rs. 39 Lacs submitted in lieu of EMD and security deposit for a period of 1 year upto 10.06.2023 vide letter dated 23.04.2022 (Doc. No. 19) and bank guarantee bearing No. 061621G210000106 dated 14.06.2021 of Rs. 27,60,000/- submitted in lieu of performance bank guarantee for a period of 1 year upto 14.06.2023 vide letter dated 23.04.2022 (Doc. No. 20) issued by Indian Bank branch at DRM Office, Delhi And/or;



(c) Pass an order thereby directing the respondent to approve the addendum and corrigendum and release the amount pursuant to the sanction dated 18.04.2022 of the partial addendum/corrigendum of Rs. 40 Lacs approx And/or;

(d) Pass an order thereby directing the respondent to record the work done as mentioned by the petitioner in its letter dated 23.08.2020 in the presence of the authorized representative of the Petitioner And/or;

(e) Pass an order thereby directing the respondent to measure the work done by the petitioner post 25.03.2022 till the date of termination notice in the presence of authorized representative of the petitioner And/or;

(f) Award cost of this proceeding in favour of the petitioner and against the Respondent"

Learned Counsel for the petitioner submits that only 10% of work is left to be completed and intention is that it shall be completed as expeditiously as possible. Let petitioner move a representation to the respondent. The respondent may consider it in accordance with law, without prejudice.

Issue notice.

Sh. Bhagvan Swarup Shukla, Central Government Standing Counsel accepts notice.

Let reply be filed within two weeks.

List the matter before Roster Bench on 05.08.2022.

I.A. 9822/2022 (stav)

An application u/s 151 CPC for grant of ex parte interim direction has been moved. It has been submitted that in case the ad-interim injunction is not granted, the petitioner will suffer irreparable loss as the petitioner has apprehension that the respondent will encash the bank guarantee with the intention of causing loss / losses to the petitioner pursuant to the illegal termination of notice dated 09.06.2022 received on 13.06.2022.

It has been submitted that respondents be restrained from encashing bank guarantee no. 0216219IPG025262 dated 10.06.2020 of Rs. 39 Lacs submitted in lieu of EMD and security deposit for a period of 01



year upto 10.06.2023 vide letter dated 23.04.2022 and bank guarantee bearing No. 06162IG210000106 dated 14.06.2021 of Rs. 27,60,000/- submitted in lieu of performance bank guarantee for a period of 01 year upto 14.06.2023.

Issue notice of the application to the respondent. Mr. Bhagvan Swarup accepts notice and seeks time to file the reply.

Let reply be filed within four weeks.

In the meantime the bank guarantees, as mentioned above, be not encashed, if not already encashed.

List the matter before Roster Bench on 05.08.2022.”

11. The petitioner, *vide* communication dated 12.07.2022, intimated to the respondent that it did not intend to waive the applicability of Section 12(5) of the Arbitration and Conciliation Act, 1996. Pursuant thereto, the respondent sent a communication dated 14.07.2022 addressed to the petitioner stating as under:-

“NORTHERN RAILWAY

*Head Quarter Office,
Baroda House,
New Delhi.*

No.63-W/5/1221/WA

Dated: 14.07.2022

*M/s. N.K. Sharma,
G-134, Near NH-24,
Gazipur Village,
Delhi-110096*

Sub:- Arbitration in c/w : “ Replacement of old washing cum pit line no. 20 & 21 and building of sewerage disposal arrangement in the section of SSE/Works/DLI under ADEN/DLI”.

Ref: Your office letter No. Nil dated 01.06.2022.

Dear Sir,

In terms of clause 64(3)(b)(ii) of IRGCC-2022 for implementation of Arbitration and Conciliation (Amendment) Act 2015, a panel of four retired Railway Officers of the railway, as approved by General



Manager/Northern Railway is given below:-

1. Sh. Kunj Behari Lai Mittal, Retd. GM/NER (9871133300)
2. Sh. B. Srinivasan, Retd, FA&CAO/MTP/SR (9444475810)
3. Sh. Dinesh Kumar, Retd. PCEE/RCF/KXH (9821783939)
4. Sh. Mahipal Singh, Retd. CBE/NR (8750902286)

You are requested to suggest at least two names out the above panel to be appointed as Co-Arbitrator (contractor's nominee) by the General Manager, Northern Railway within 30 days from the date of dispatched request by this office. In terms of Clause 4 of Arbitration and Conciliation Act-1996, if you fail to comply with the requirement of the Arbitration agreement to suggest two names within 30 days as mentioned earlier, it will be treated that you have waived off your right to suggest 2 names of the arbitrators and as such the demand of the arbitration.

*(Harvinder Singh)
Dy.Chief Engineer/Genl
For General Manager/Engg.*

Copy:-

1. Secy to AGM/N.Rly New Delhi for kind information
2. Sr. DEN/III/DLI w.r.t. case No. 128-W/269/120/2018-19/W-3 for information and necessary action please."

12. Learned counsel for the petitioner contends that the aforesaid letter dated 14.07.2022 and the appointment procedure in the present case is in contravention of the law as laid down by this court in ***Margo Networks (P) Ltd. v. Railtel Corpn. of India Ltd.***, 2023 SCC OnLine Del 3906 and the judgment of the Supreme Court in ***Perkins Eastmen Architect DPC & Ors. v. HSCC (India) Ltd.***, AIR 2020 SC 59. It is submitted that an independent Sole Arbitrator is required to be appointed in the matter.

13. Learned Standing Counsel for the respondent does not dispute the applicability of the judgment of ***Margo*** (supra) and ***Perkins*** (supra), and the requirement to constitute an independent Arbitral Tribunal.

14. The only objection taken by the respondent is that the present petition is pre-mature. It is submitted by learned Standing Counsel for the



respondent that the petitioner has not taken recourse to Clause 63 of the GCC before approaching the Court. It is further submitted that use of the word 'shall' in the Clause 63 of GCC makes it mandatory for the parties to refer the dispute to the General Manager, before invoking the arbitration clause.

15. In response to the aforesaid objection, learned counsel for the petitioner has emphasised that from the respondent's own communications (as reproduced hereinabove), it is evident that the respondent itself took steps to constitute an arbitral tribunal and even called upon the petitioner to choose its nominee from the list forwarded by the respondent. He also relies upon the judgment of this Court in ***Union of India v. J. Sons Engineering Corporation Ltd.***, 2015 SCC OnLine Del 8765, wherein it has been held as under:-

"22... The clause 61 of the General Conditions of Contract relates to the termination effected for the reasons attributable to the Railways. Clause 62 relates to determination of contract owing to the default of the contractor. It is an undisputed fact that in the notice dated April 26, 2004, the reasons given for the proposed action was that the respondent had failed to abide by the instructions issued to commence the work/to show adequate progress of work. The reasons are found mentioned in clause 62(vii) of the General Conditions of Contract. The reply to the notice was given by the respondent on May 4, 2004. Vide letter dated May 7, 2004, the petitioners issued another notice of 48 hours under clause 62 of the G.C.C. on expiry of which period, the contract was to stand rescinded. The notice dated May 7, 2004, according to the respondent, was received on May 11, 2004, after the petitioners had rescinded the contract on May 10, 2004. The respondent made a representation dated May 21, 2004 against the letter dated May 10, 2004. As noted from the petition, the petitioner No. 2 addressed a letter dated September 10, 2004 suggesting a panel of Arbitrators seeking consent of the respondent for constitution of an Arbitral Tribunal. The demand for arbitration and the constitution of an Arbitral Tribunal was under clause 64 of the G.C.C. There is nothing on record to suggest that the petitioners had considered the respondent's representation and notified the decision in terms of clause 63 of the G.C.C. In the absence of a decision under clause 63, the bar under clause



63 would not apply. In other words, all matters related to the clauses mentioned in clause 63 would be treated as 'excepted matters' if a decision is taken by the Railways. The necessary corollary is the claims made by the respondent cannot be deemed as 'excepted matters'. I note, the petitioners had taken a Ground (A) in the petition as the claims being 'excepted matters'. The petitioners have not averred nor placed on record any notification, notifying their decision on the respondent's representation as contemplated in clause 63 of the G.C.C. The decision dated May 10, 2004 would be a decision under clause 62 and not under clause 63. Suffice to state, after a decision under clause 62, the petitioners had taken a decision under clause 64 without resorting to clause 63. Suffice to state, the claims are not 'excepted matters'. ...”

16. Having perused the record and having heard learned counsel for the parties, no merit is found in the objection raised by the learned Standing Counsel for the respondent.

17. The respondent vide its letter dated 17.06.2022, in response to the invocation letter dated 01.06.2022 sent by the petitioner, had agreed for constitution of the Arbitral Tribunal, albeit seeking a waiver of Section 12(5) of the A&C Act from the petitioner. On the petitioner refusing to the requirements of waive Section 12(5) of the A&C Act, the respondent vide its letter dated 14.07.2022, shared a panel of four retired Railway Officers with the petitioner and requested the petitioner to suggest at least two names out of the panel to be appointed as Co-Arbitrator. The respondent having agreed to constitute the Arbitral Tribunal cannot now seek to resist arbitration by seeking to reply upon Clause 63 of the GCC.

18. This Court has also perused the invocation letter dated 01.06.2022 and *prima facie*, none of the claims raised therein falls within 'excepted matters'. However, this aspect would require an in-depth examination of the factual matrix which can be done by a duly constituted Arbitral Tribunal, as contemplated in the judgment of the Supreme Court in *Vidya Drolia v.*



***Durga Trading Corpn.*, (2021) 2 SCC 1.**

19. Although as per Clause 64 of the GCC a three member Arbitral Tribunal is to be constituted to adjudicate the disputes between the parties, respective counsel for parties, on instructions, have submitted that in the event of this court being inclined to constitute an Arbitral Tribunal, a Sole Arbitrator be appointed to adjudicate the disputes between the parties.

20. Accordingly, Mr. Kirit Javali, Advocate (Mob. No.: 9810518044) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

21. The respondent shall be entitled to raise preliminary objections as regards jurisdiction/arbitrability before the learned arbitrator, which shall be decided by the learned arbitrator, in accordance with law.

22. The learned Sole Arbitrator may proceed with the arbitration proceedings subject to furnishing to the parties requisite disclosures as required under Section 12 of the A&C Act.

23. The learned Sole Arbitrator shall be entitled to fee in accordance with Fourth Schedule to the A&C Act; or as may otherwise be agreed to between the parties and the learned Sole Arbitrator.

24. The parties shall share the arbitrator's fee and arbitral costs, equally.

25. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Arbitrator on their merits, in accordance with law.

26. Needless to say, nothing in this order shall be construed as an expression of opinion of this court on the merits of the respective case of the parties.

27. The present petition stands disposed of in the above terms.



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28. Since an Arbitral Tribunal has been constituted to adjudicate the disputes between the parties, it would be appropriate if the present petition alongwith the pending application, be treated and dealt with as an application under Section 17 of the Arbitration & Conciliation Act, 1996. It is directed accordingly.

29. The interim order dated 22.06.2022 shall continue subject to further order/s that may be passed by the learned sole Arbitrator.

30. The present petition along with pending application stands disposed of in the above terms.

DECEMBER 01, 2023/hg

SACHIN DATTA, J