GAHC010065452023

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Arb.P./15/2023

M/S PEYUSH TRADERS
A COMPANY REGISTERED UNDER THE INDIAN COMPANIES ACT, 1956, HAVING ITS REGISTERED OFFICE AT LATISH PLAZA, SHOP NO. 2, OPPOSITE GANESH MANDIR, MALANG ROAD, DWARLII GAON, KALYAN (EAST), MAHARASHTRA-421306 AND REPRESENTED BY ITS AUTHORIZED SIGNATORY, SHRI MANOJ BHATTACHARJEE, RESIDENT OF PANBAZAR, P.S. PANBAZAR, SUB-DIVISION, DIST. KAMRUP(M), GUWAHATI-781001.

VERSUS

THE GENERAL MANAGER, NORTHEAST FRONTIER RAILWAY AND 4 ORS
SHUTTLE GATE ROAD, EAST MALIGAON, GUWAHATI, ASSAM-781011.

2:LAW SECTION

NORTHEAST FRONTIER RAILWAY
SHUTTLE GATE ROAD
MALIGAON
GUWAHATI
ASSAM-781011.

3:THE SENIOR COACHING DEPOT OFFICER
COACHING DEPOT OFFICE
NORTHEAST FRONTIER RAILWAY
PALTANBAZAR
GUWAHATI-781001.

4:DIVISIONAL FINANCE MANAGER
NF RAILWAY/GUWAHATI AREA MANAGER
OFFICE STATION ROAD
GUWAHATI-781001.

5:THE CHIEF WORKSHOP ENGINEER
NORTHEAST FRONTIER RAILWAY
SHUTTLE GATE ROAD
MALIGAON
GUWAHATI
ASSAM-781011

Advocate for the Petitioner : MR. K N CHOUDHURY

Advocate for the Respondent : DY.S.G.I.

BEFORE
HONOURABLE MR. JUSTICE ARUN DEV CHOUDHURY

JUDGMENT

Date : 20-03-2024

1. Heard Mr. R. Choudhury, learned counsel for the petitioner and Mr. K Gogoi, learned CGC for the respondent.

2. This is a petition filed under section 11 of the Arbitration and Conciliation Act, 1996 by the petitioner seeking intervention of this Court in the matter of appointment of arbitral tribunal in adjudicating the disputes between the petitioner and the respondents arising out of a contract agreement for cleaning washing and transportation of linen sets to and from the premises of the Indian Railways in Guwahati.

3. The brief facts leading to the filing of this present petition can be summarized as below:

I. Pursuant to an NIT dated 08.02.2018, for outsourcing works in relation to cleaning, washing and transportation of linen sets to and from railway premises for a period of 3 years, wherein the petitioner herein participated, a contract was executed between the petitioner and the respondent railways.

II. Certain disputes arose between the parties and accordingly

a seven days notice in terms of clause 62 of the GCC was issued. Thereafter, alleging non compliance, a notice of 48 hours was issued to the petitioner by the railways on 05.08.2019.

III. Thereafter on 07.08.2019, the contract was terminated. The bank guarantee deposited by the petitioner in terms of the contract was sought to be en-cashed. Accordingly, two writ petitions were filed by the petitioner assailing the termination of contract and assailing the encashment of bank guarantee. This court by interim orders stayed the encashment and subsequently the writ petitions were disposed of granting liberty to the petitioner to seek adjudication of his disputes by arbitration. It was further provided that the interim order passed earlier shall continue and the same can be modified by the Arbitrator.

IV. Thereafter the petitioner issued a notice raising the dispute and inviting appointment of arbitrator. The petitioner also nominated/proposed the name of sole arbitrator to adjudicate the dispute between the parties in terms of clause 64.1(2)(a).

V. Thereafter, the railways in reply to such notice, by its communication dated 30.12.2022 advised the petitioner to demand arbitration to the general manager NF Rly Maligaon in writing with the subjects.

VI. The petitioner thereafter communicated that the mechanism of appointment of arbitral tribunal under contractual scheme between the parties has been held to be invalid, *void ab initio* by the Hon'ble Apex Court and therefore claimed that such procedure of appointment of arbitrator cannot be acted upon. It was further claimed that since the General Manager, NF Rly, Maligaon is also a party to the dispute, therefore, such GM cannot sit over its own

case as an adjudicator and accordingly the petitioner reiterated its demand for nomination of the arbitrator proposed by the petitioner as the sole arbitrator.

VII. Alleging inaction on the part of the railways, the present application has been filed under section 11(6) read with section 11(4) in the Arbitration and Conciliation Act'1996 for appointment of an arbitrator by this court.

4. While deliberating on their respective cases, the learned counsel for the parties had confined their argument to the dispute raised as regard the procedure of appointment of arbitrator in terms of the arbitration clause contained in the contract and the resultant impartiality of such arbitrator. No dispute as to the existence of the arbitration clause, privity of contract between the petitioner and the respondent has been raised. Arbitrability of the dispute arising out of the termination of the contract in question has also been raised.

5. Clause 64.3(b)(II) of the Standard General Condition of Contract (hereinafter refers to as GCC) contains the provision of constitution and composition of the arbitral tribunal. Such clause prescribes that the arbitral tribunal shall comprise of three retired officers, namely, officers who have worked for the railways and the appointing authority shall be the general manager of the respondent railways. The grievance of the petitioner is such a prescription.

6. **ARGUMENTS ADVANCED BY THE LEARNED COUNSEL FOR THE PETITIONER**

Mr. R. Choudhury, learned Counsel for the the petitioner contends:

I. The prescription of three retired railway officers to consist of the arbitral tribunal to be appointed by the general manager

of the respondent is ineffective, inoperable and against the principle of law laid by the Apex court in the case of ***Voestalpine Vs. Schienen GmbH Vs. Delhi Metro Rail Corporation Ltd*** reported in ***(2017) 4 SCC 665***.

II. Such tribunal is also disqualified in terms of clause 1 of the seventh schedule under proviso to section 12(5) of the Act 1996.

III. In terms of the decision of the Apex Court rendered in ***TRF Ltd Vs. Energo Engineering Projects Ltd*** reported in ***(2017) 8 SCC 377***, ***Parkins Eastman Architects DPC and Another Vs. HSCC (India)*** reported in ***(2020) 20 SCC 760***, ***Union of India Vs. Ms. Tantia Construction*** reported in ***(2021) SCC Online SC 271*** and in terms of the provision of section 12(5) of the Act'1996, the General Manager himself is disqualified to nominate an arbitrator and therefore, such arbitration clause cannot be acted upon.

IV. The learned Counsel concluded his argument by proposing the name of Mr. Justice B.P. Katakey, a former judge of this court as the sole arbitrator to adjudicate the dispute between the parties. He has also submitted that the petitioner shall have no objection to appointment of any other arbitrator by this court except any employee or ex employee of the railways.

7. **ARGUMENTS ADVANCED BY THE LEARNED COUNSEL FOR THE RESPONDENTS**

Per contra Mr. Gogoi learned CGC contends the following:

I. As per contract agreement dated 11.02.2019 entered into between the petitioner and the respondent railways, the

contract is to be governed by the Indian Railway's GCC. All the modification of GCC issued from time to time during the tenure of the contract will also be applicable to the contract in terms of item no.16 of the contract agreement and item number 19 of the annexure – A thereof inasmuch as the arbitration shall be governed as per clause 63 & 64 of the GCC 2014.

II. The Apex Court in the case of ***Central Organization for Railway Electrification (CORE) Vs. ECI-SPIC-SMO-MCML (JV)*** reported ***(2020) 14 SCC 712*** dealing with pari-materia Arbitration Clause held that when there is a clear stipulation in the arbitration clause as regards manner of appointment of and composition of the arbitral tribunal, the appointment of arbitrator should be in terms of such clause as agreed by the parties. In the backdrop of such settled legal position and undisputed fact of prescription of the arbitration clause agreed by the parties, the petitioner now cannot raise dispute as regards procedure of appointment and composition of Arbitral Tribunal.

III. The arbitration clause referred to in CORE, the Apex Court dealt with an exactly similar arbitration clause involving railways and such determination is holding the field as on date and therefore this court may not appoint an arbitrator beyond the prescription made in the contract entered into between the parties.

IV. The notice seeking arbitration was issued by the advocate on behalf of the party and the expression party as defined in the Act 1996, means a party to the agreement and such definition is not qualified in any way so as to include the agent of the party to

such agreement. Therefore, the demand of arbitration issued by the advocate of the party cannot be treated as a valid demand of arbitration and therefore on this count also the present petition is liable to be dismissed. In support of such contention Mr. Gogoi relies on the decision of the Apex Court in ***Benarsi Krishna Committee Vs. Karmyogi Shelters Private Limited*** reported in 2012 9 SCC 496.

V. Embargo of section 12(5) was incorporated prior to the execution of the contract in question and therefore, for all meaning and purport the petitioner has waived its right to raise the validity of the arbitration clause in terms of the proviso to section 12(5) inasmuch as the ineligibility mandated under section 12(5) is not absolute and therefore, the petitioner cannot raise such an issue at this stage and after signing the contract.

VI. The learned Counsel concluded his argument by submitting that in the event the present application is allowed, the Railways will prefer an arbitrator empanelled and notified by Gauhati High Court under Notification No.99 dated 04.08.2023.

8. <u>DECISION AND DETERMINATION:</u>

I. I have given anxious consideration to the arguments advanced by the learned counsel for the parties and perused the arbitration clause and also gone through the authorities relied upon by the learned Counsels.

II. In **CORE**, it was held that the constitution of the Arbitral Tribunal should be in accordance with the terms of the contract; the reasons that the panel of arbitrators consist of names of the retired employee of the Indian Railways, same will

not make them ineligible.

III. In **TRF,** after deliberation on the issue of unilateral appointment of arbitrator, it was held that a party interested in the dispute or who shares a conflict, cannot be eligible to be appointed as an arbitrator without giving due choice to the other party. It was further held that when the person having power to appoint an arbitrator is himself ineligible to act as an arbitrator, his power to nominate any other individual as an arbitrator also stands obliterated.

IV. In the considered opinion of this Court, the amended provision of Section 12 (5) of the Act '1996 in no unambiguous terms debars unilateral appointment of arbitrators.

V. In **Voestalpine**, the Apex Court emphasized a broad based approach for appointment of arbitrators while affirming the principle laid down in **TRF.** In **Voestalpine,** the hon'ble Apex Court further expressed its opinion that a panel of prospective arbitrators cannot always be invalid as long as they are not interested or in the conflict with the dispute.

VI. In **Perkins,** Apex Court opined that importance of independence and impartiality of an arbitrator can be achieved when both the parties can nominate respective arbitrators of their choice. A further proposition of adoption of an "counter balance" approach was propagated in **Perkins,** so as to give equal rights to the parties to nominate arbitrators.

VII. In **Union of India Vs. Tantia Construction Ltd (supra),** the correctness of **CORE** was questioned and accordingly the matter has been sent to a larger bench.

VIII. In the considered opinion of this Court, in **TRF Ltd** the

provision of section 12 of the Act 1996 and 7th schedule was extensively dealt with by the Apex Court and clarified that an interested person cannot either appoint an arbitrator or be an arbitrator himself.

IX. There is no doubt that one of the fundamental elements of arbitration is the impartiality and independence of an arbitrator. Principles of natural justice, equity and fair play require that no one can act as a judge in their own case.

X. If anyone looks into background of amendment made to the Act'1996 including incorporation of Section 12 (5) to the Act'1996, it is clear that the Law Commission of India, with an object to protect the integrity of arbitration in India having a neutral, impartial and unbiased character recommended amendments to the Arbitration and Conciliation, Act 1996 and thus prescribed to disqualify any person for appointment as an arbitrator, whose relationship with either of the parties may attribute bias. The parliament also in its wisdom amended the Act'1996 and incorporated Section 12(5), which prescribed that notwithstanding any prior agreement to the contrary, any person whose relationship, with the Parties or the counsel or the subject matter of the dispute falls under any of the categories specified in the 7th schedule, shall be ineligible to be appointed as an arbitrator subject to a right of waiver of applicability of such sub section 5 of section 12, by any expressed agreement in writing.

XI. Paragraph 12 of 7th schedule debars a manager, director or part of management or who is having a similar controlling influence in one of the parties to become an arbitrator.

XII. In the aforesaid context in no unequivocal terms in **TRF**, the hon'ble Apex Court held that when a person himself is disqualified to be an arbitrator shall not have power to appoint an arbitrator. Such an amendment came into effect from 13.10.2015. The contract in question was executed in the month of February 2018. Thus, on the date of execution of such contract the mandate of section 12(5) read with paragraph 12 of the 7th schedule was holding the field. Therefore, the General Manager, in terms of the mandate of the amended provision of section 12(5) read with paragraph 12 of 7th schedule is a person who is disqualified to be appointed as arbitrator and therefore he will have no power to appoint an arbitrator in terms of the settled proposition of law as declared by the hon'ble Apex Court in **TRF**.

XIII. In the case in hand, the number of arbitrators are prescribed to be a panel of three railway gazetted officers, all of them are either railway officers or retired railway officers. It is also prescribed in the clause that the railway shall propose four names and the contractor is to suggest two names out of the panel. Railways have been given discretion to appoint one of them. Thus not only the officers and employees who have retired from railways but also officers and employees who are still serving the railway are qualified to be appointed as an arbitrator; such a course of action is against the prescription of neutrality of an arbitration proceeding.

XIV. Further, the Choice of the Contractor is also limited to one of the railway officers enlisted by the railways. Such a course of action will create a situation when an interested or

connected party shall sit over in arbitration and settle the dispute. Therefore for balancing the rights of the parties and with due weightage to the provision of section 12(5) of the Act 1996 read with 7th Schedule, both the parties should be given a chance to propose the name of their arbitrator so that this court can proceed further.

XV. Now coming to the determination made in **CORE**, the reference in the said case was whether retired railway officers are eligible to be appointed as arbitrator under section 12(5) read with schedule 7 of the Act and whether they were statutorily made ineligible to be appointed as arbitrator. It was answered and held that they are not ineligible.

XVI. It is evident from the determination made in **CORE** that the issue was as regards eligibility of appointment of retired railway employees and it was the conclusion of the Apex Court at paragraph 26 that merely because the panel of arbitrators are retired employees, who have worked in the railways, it does not make them ineligible to act as an arbitrator.

XVII. On the other hand, in the case in hand, as we look into the clauses in question, it prescribes a panel of arbitrator consisting of :

1. Three Gazetted railway officers not below junior administrative grade.
2. Railway gazetted officers not below junior administrative grade;
3. And a retired railway officer, retired not below the rank of senior administrative grade

XVIII. Out of the aforesaid panel, the railway is entrusted to

send four names of gazetted railway officers, which may also include the retired railway officers and out of which two names can be suggested by the contractor. Such prescriptions do not even confirm the mandate of **CORE** inasmuch as discussed herein above, the issue in **CORE** was as regards eligibility of retired railway officers for being appointed as arbitrator.

XIX. In the case in hand, there may be a situation where the railway may not even send the name of a retired employee and even if it is sent, one of the Arbitrators shall be a serving railway officer. Therefore such a prescription, is in clear violation of the mandate of section 12(5) read with schedule 7 of the Arbitration and Conciliation, Act 1996. Therefore it cannot be said that in the given facts of the present case, the ratio laid down in CORE shall be applicable as urged by the learned CGC rather, it is the ratio rendered in **TRF** and **Voestalpine** shall more aptly be applicable.

XX. The issue in **Benarsi** (supra) relates to whether delivery of arbitration award on agent or advocate of a party amounts to service of the award on the party itself under section 30(1) and 34(3) and it was held that arbitration proceeding does not include agent or advocate representing the party. It was further held that it is one thing for an advocate to act and plead on behalf of a party in a proceeding and it is another for an advocate to act as the party himself. In the case in hand the notice dated 08.02.2018 raising the claim and dispute was not issued by the advocate as a party himself but acted on behalf of the party to the contract. Therefore, in the considered opinion of this court, the ratio laid down in the **Benarsi** is clear to the

effect that an advocate can act on behalf of a party in a proceeding, however, such advocate cannot act as a party himself. Therefore, in the given facts of the present case as discussed hereinabove, the ratio laid down in **Benarsi** (supra) cannot be made applicable to reject the act of issuance of notice by the advocate on behalf of the party.

XXI. Now coming to the argument of Mr. K Gogoi learned counsel as regards waiver of right by the petitioner in terms of proviso to section 12(5) read with 7th schedule of the Act, 1997, it is no more res-integra that section 12(5) relates to dejure ineligibility of an arbitrator to act as an arbitrator. The only way in which such in-eligibility can be removed is by the proviso and such proviso has been read down by the hon'ble Apex Court in ***Bharat Broadband Network ltd Vs. United Telecoms Ltd*** reported in ***(2019) 5 SCC 755*** and held that parties may, after the dispute has arisen between them, waive the applicability of section 125 by an express agreement in writing. That being the position and in the backdrop of admitted fact that there was no written and express agreement between the parties to waive the right under section 12(5) of the Act, the arguments advanced by Mr. Gogoi is bound to fail.

9. <u>DIRECTION:</u>

In view of the decision and determination made herein above, the present petition stands allowed by appointing Hon'ble Mr. Justice (retired) H.N. Sarma as arbitrator to adjudicate the dispute between the parties in question.

JUDGE

Comparing Assistant