

OCD-1

ORDER SHEET

AP-COM/975/2024
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION
COMMERCIAL DIVISION
ORIGINAL SIDE

PIONEER FABRICATORS (P)LTD.

VS

EASTERN RAILWAY

BEFORE:

The Hon'ble JUSTICE SHAMPA SARKAR

Date: 18thDecember, 2024.

Appearance:

Mr. Dwip Raj Basu, Adv.

Mr. PourushBandopadhyay, Adv.

Mr. SohamSanyal, Adv.

...for the petitioner

Mr. Ajit Kumar Mishra, Adv.

Mr. Abhishek Dey, Adv.

...for the respondent

The Court:Petitioner seeks appointment of an arbitrator in terms of clause 64.(3)(a)(ii) of the Indian Railways Standard General Conditions of Contract on the ground that huge amount of money payable on account of the work executed by the petitioner pursuant to a Letter of Acceptance issued by the Eastern Railway, is lying unpaid. Further claim is for compensation on account of termination. The petitioner further contends that the provision of selection of arbitrators from a panel comprising of three or more Gazetted Railway Officers to be supplied by the respondent and from which the

petitioner would have to choose its nominee is no longer permissible in law, in view of decisions of the Hon'ble Apex Court in ***Perkins Eastman Architects DPC and Anr. Vs. HSCC (India) Ltd.*** reported in **(2020) 20 SCC 760** and also ***Central Organisation for Railway Electrification vs. M/s ECI SPIC SMO MCML (JV) A Joint Venture Company*** reported in **2024 INSC 857**. In ***M/s EC SPIC SMO MCML (supra)*** The Hon'ble Apex Court held as follows :-

“d. In the appointment of a three-member panel, mandating the other party to select its arbitrator from a curated panel of potential arbitrators is against the principle of equal treatment of parties. In this situation, there is no effective counterbalance because parties do not participate equally in the process of appointing arbitrators. The process of appointing arbitrators in CORE (supra) is unequal and prejudiced in favour of the Railways;

e. Unilateral appointment clauses in public-private contracts are violative of Article 14 of the Constitution;

f. The principle of express waiver contained under the proviso to Section 12(5) also applies to situations where the parties seek to waive the allegation of bias against an arbitrator appointed unilaterally by one of the parties. After the disputes have arisen, the parties can determine whether there is a necessity to waive the nemo judex rule; and”

The petitioner invoked the arbitration clause and made a demand for arbitration, by issuing a notice dated April 12, 2024. After exhausting the time limit prescribed under the said clause within which the respondent was to share the panel of arbitrators, this court has been approached by the petitioner as the respondent did not act on the basis of the notice invoking arbitration.

Mr. Mishra, learned advocate for the Railways submits that clause 64.3 (a) (ii) in the General Conditions of Contract, will be applicable and the petitioner is required to follow such procedure. It is further contended that the

contract with the petitioner was terminated and termination of a contract did not come within the purview of arbitration clause. The General Condition of Contract should be read into the Letter of Acceptance which had been issued to a successful bidder. The bidder, in this case, cannot avoid the terms and conditions of clause 64 (3) (a) (ii). Mr. Mishra further contends that the dispute will be covered by the Micro, Small and Medium Enterprises Development Act, 2006 as the petitioner under the conditions of the tender was required to supply and fabricate open webs through girder, for bridges between Katwa and Bazarsau.

Heard the parties.

Clause 64 of the General Conditions provides for settlement of disputes through arbitration. The contractor who invokes the arbitration clause has to choose its nominee from the panel to be supplied by the respondent. The Arbitral Tribunal consists of a Panel of three Gazetted Railway Officers not below JA Grade or 2 Railway Gazetted Officers not below JA Grade and a retired Railway Officer, not below the rank of SAG. For such purpose, the Railways shall have to send to the contractor a panel of more than three names of the Gazetted Railway Officers of one or more departments of the Railways, which may also include the name(s) of retired Railway Officer(s) empanelled to work as Railway Arbitrators, within 60 days from the day when a written and valid demand for arbitration is received by the GM. The contractor is to suggest

two names out of the panel for appointment as contractor's nominee within 30 days from dispatch of the request by Railway. The GM shall appoint at least one out of them as the contractor's nominee and thereafter appoint the balance number of arbitrators either from the panel or from outside the panel duly indicating the presiding arbitrator from amongst the three arbitrators so appointed. GM is to complete the exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contractor's nominee.

The clause is quoted below:-

“64. (3) (a) (ii) In cases not covered by the Clause 64(3)(a)(I), the Arbitral Tribunal shall consist of a Panel of three Gazetted Railway Officers not below JA Grade or 2 Railway Gazetted Officers not below JA Grade and a retired Railway Officer, retired not below the rank of SAG Officer, as the arbitrators. For this purpose, the Railway will send a panel of more than 3 names of Gazetted Railway Officers of one or more departments of the Railway which may also include the name(s) of retired Railway Officers) empanelled to work as Railway Arbitrator 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 to 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 is from the Accounts Department. An officer of Selection Grade of the Accounts Department shall be considered of equal status to the officers in SA grade of other departments of the Railway for the purpose of appointment of arbitrator.”

The petitioner approached the authority prior to issuance of the said notice, for settlement of the claim. It is contended that last of such letter was written on January 12, 2024.

The contractor invoked the arbitration clause by issuing a notice dated April, 12, 2024. The respondent failed to respond to the said notice not only during the period prescribed but also beyond. Accordingly, the mechanism prescribed in the conditions failed. The petitioner has approached this Court for appointment of an arbitrator as the mode of appointment is no longer permissible and also because the mode failed, when the respondent did not act. Although the petitioner seeks appointment of a sole arbitrator, the Railways are not willing to deviate from the provision of an Arbitral Tribunal as prescribed in the Conditions.

Under such circumstances, this Court deems it fit to appoint an arbitral tribunal comprising of three members. The court appoints Mr. Prabal Kumar Mukherjee, learned senior advocate as the petitioner's nominee, Mr. Sakya Sen, learned senior advocate as the respondent's nominee and Hon'ble Justice Sahidullah Munshi (retired) will be the third and presiding arbitrator. The appointment shall be subject to Section 12 of the Arbitration and Conciliation Act, 1996 and the arbitral tribunal shall fix the remuneration as per the schedule of the Act. The issues raised by Mr. Mishra can be raised

before the learned arbitrator. This Court is, prima facie, satisfied that the dispute is alive and there is existence of an arbitration clause in the contract.

AP-COM 975 of 2024 is accordingly disposed of.

All parties are to act on the basis of the server copy of this order.

(SHAMPA SARKAR, J.)

TR/