2024:CGHC:44801

NAFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

ARBR No. 27 of 2024

M/s SMS Limited Nagpur Having Its Registered Office At It Park 20 S.T.P.I Gayatri Nagar Parsodi Nagpur 440022 Mahashartra Through Its Authorized Representative Mr Pradyumna Pandhare S/o Shri Sharad Chandra Pandhare Aged About 43 Years R/o Pratap Nagar, Nagpur. 440022.

... Applicant

versus

RITES Ltd. Through Director Projects (Projects), RITES Ltd. RITES Bhawan-1 Sector 29 Gurgaon, 122001 (Haryana).

... Non-Applicant

For Applicant	:	Mr. Hari Agrawal, Advocate.
For Non-Applicant	:	Mr. Ramakant Mishra, Deputy Solicitor General

Hon'ble Mr. Ramesh Sinha, Chief Justice

Order on Board

18/11/2024

1. Heard Mr. Hari Agrawal, learned counsel for the applicant as well as Mr. Ramakant Mishra, learned Deputy Solicitor General for the non-applicant.

2. This is an application under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of an Arbitrator.

3. The facts, in brief, as projected by the applicant is that the applicant is a company registered under the Companies Act, 1956. Tender No. 06/OT/NTPC-LARA/KRL-LARA SECTION/PKG-II B dated 03.08.2016 was floated for the work of "Execution of Earthwork in formation, Construction of Minor Bridges, Blanketing, P-Way linking works including supply of P-Way Fittings, Track Ballast, PSC Sleeper and Points and crossings in connection with construction of Railway Infrastructure from 12/000 KM LP to 18/610 KM LP, KRL-Lara Section of NTPC Railway Siding, in Raigarh District, Chhattisgarh State (Package-II B)". The tender for above work was accepted by the non- applicant as an agent acting on behalf of NTPC Lara. Subsequently, a formal agreement dated 24.07.2017 was entered into between the parties herein

4. For the purpose of completion of the priority line, three agencies were engaged by the non-applicant. Out of the three agencies, the applicants had placed order for procurement of PSC Sleepers through M/s Sri Raja Rajeswari Constructions (India) Pvt. Ltd., Hyderabad on M/s Patil Rail Infrastructure Pvt. Ltd. having their plant at Kargi Road, Near Railway Station, Bilaspur (CG), being a railway approved factory as required under the agreement. The non-applicant requested South Eastern Central Railway (for short, the SECR) to allow M/s Patil Rail Infrastructure Pvt. Ltd. to supply the PSC Sleepers to the vendors to ensure completion of MGR work by March, 2019. On 18.07.2018, a Contractor's Progress Review Meeting was convened by RITES in which representative of the applicant was also present. In the meeting, it was informed that purchase order of PSC Sleepers has been placed by the agencies, however, it was informed by Railways that they themselves are running short of sleepers and therefore supply to agencies other than Railway was not possible. The applicant was therefore asked to look for alternate source for sleeper procurement other than Railway so that during monsoon period sleepers could be procured and transported to site of work. The applicant was further directed to explore possibility of getting PSC Sleepers from non-railway manufacturing plant from other Zonal Railways. Hence, quotation was called for transportation of PSC Sleepers. On 24.07.2018, NTPC shared its concern regarding delay in procurement of PSC Sleepers further delaying the completion of work of priority line and directed non-applicant to make serious efforts to ensure timely supply of PSC Sleepers from other available sources. Again in meeting dated 27.07.2018, non-applicant was directed to escalate the issue of procurement of PSC Sleepers and explore availability from other vendors. In pursuance of the earlier Progress Meeting, the applicant apprised the non- applicant that none of the authorized suppliers of PSC Sleepers are ready to supply the sleepers and informed regarding the availability of other vendors having factories in Maharashtra and Madhya Pradesh. It was further informed that transportation charges and cost of material has hiked up and therefore requested for consent to procure items subject to payment of excess rate variation.

5. On 17.09.2018, the SECR through its official communication to non-applicant expressed its inability to allow supply of PSC Sleepers due to shortfall in anticipated supply against the requirement of Railway for 2018-19. Again in the Progress Review Meeting dated 18.09.2018, the non-applicant had directed the applicant to explore possibility of procurement of PSC Sleepers from non-railway vendors or other Zonal Railways. At the meeting, the applicant had informed non-applicant regarding their proposal to procure PSC Sleepers from Gita Group Vishal Nirmiti Private Ltd. from their various factories located in Maharashtra and Madhya Pradesh, however, it was later informed that the said

Company was unable to supply the PSC Sleepers from their factories in Maharashtra and Madhya Pradesh but from Himachal Pradesh. The same would entail rate variation on account of increased transportation charges. The applicant through its letter dated 05.12.2018 intimated the non-applicant regarding the complete facts along with quotation of transportation charges. The non-applicant apprised NTPC with the complete factual situation and requested for approval on the proposal of additional financial implication. NTPC requested the non- applicant to submit proposal after approval from the competent authority of the non-applicant. The file was forwarded to the competent authority by the non-applicant for its approval and submission to NTPC for its concurrence by drawing a note sheet in this regard. The proposal was returned by the competent authority with certain observation. However, the non-applicant re-sent the proposal for approval of the competent authority. It has been duly recorded that since there was no other option left to meet the urgency of NTPC's requirement and since NTPC had never denied supply of sleeper from Kandhori/Bankhedi, the supply of sleeper started in December, 2018 in phased manner by which track linking work of priority line upto Kelo Bridge has been completed by 25.05.2019 and trolley run has been done with NTPC on 25.05.2019 Therefore, proposal for additional lead charges not included in NIT cost outlay and executed on special circumstance to meet NTPC's demand after due discussion and deliberation with NTPC authority and NTPC authority also agreed to submission of proposal after approval of competent authority, the same was found reasonable The same was again turned down by the competent authority on 14.11.2019. Finally, approval from the competent authority of non-applicant was received on 25.02.2021

6. Ultimately, letter was sent by non-applicant for reimbursement of additional cost of transportation of sleeper on 24.03.2021. On such approval by the competent authority of non-applicant, the work was completed by the applicant. The applicant successfully completed the work and submitted its No Objection Certificate except for the claim of the applicant for reimbursement of additional lead charges for transportation of sleepers, which was still under consideration. The issuance of NOC was with the purpose that the non-applicants pay the final bills, PVC bill and reimburse royalty, proposal for which was pending with NTPC. The same was not acceptable to the non-applicant and the non-applicant vide its letter dated 24.06 2022 requested for revised NOC for them to pay the final bill and close the contract. Therefore, another NOC dated 27.06.2022 was issued clearly mentioning about the pending claim for reimbursement of additional lead charges for transportation of sleepers.

7. Mr. Hari Agrawal, learned counsel for the applicant submits that the non-applicant pressurized the applicant to submit unconditional NOC to submit the same with NTPC for consent of final bill of the applicant. On 19.09.2022, the applicant succumbed to the pressure exercised by the non-applicant and clearly stated that it is unable to absorb any further delay in payment due to pressing financial commitment and is therefore submitting NOC in the format provided by the non-applicant. On 19.06.2023, the applicant invoked Clause 25 of the agreement and raised dispute before the Engineer-in-Charge by issuing notice. Vide letter dated 11.07.2023, the request was turned down solely on the ground that the applicant had issued NOC, conveniently ignoring that the NOC had been issued under coercing circumstances, as the pending bills were not being settled by the non-applicant without submission of NOC the non-applicant further turned blind eye to the fact that reimbursement of the additional lead involved in transportation of PSC Sleepers had been approved by the competent authority of non-applicant.

8. Mr. Agrawal further submits that as no appellate authority has been notified by the non-applicant, therefore, the applicant made request to the Chief Project Manager vide letter dated 05.08.2023, which was again rejected vide letter dated 04.09.2023 referring to clause 25(5) of the agreement. The applicant again made request to the Managing Director and Director Projects for arbitration through notice dated 25.09.2023 and proposed two names for appointment as Arbitrator. Since the non-applicant failed to appoint arbitrator in pursuance of notice dated 25.09.2023, the applicant served a notice dated 12.01.2024 upon the CMD and Director Projects, under Section 21 of Arbitration and Conciliation Act, 1996. Again, the non-applicant vide letter dated 25.01.2024 turned down the request for appointment of arbitration stating the same is not admissible in light of Clause 25(5) of the agreement. The refusal of non-applicant to entertain claim and appoint Arbitrator on the ground that NOC has been issued by the applicant, without considering that expressly, the NOC has been issued under compelling circumstances and under coercion, is in direct contravention of the mandate of the Hon'ble Supreme Court in the matter of ***Ambica Construction vs. Union of India*** {(2006) 13 SCC 175}, ***R.L. Rathia and Co. vs. State of Gujarat*** {(2011) 2 SCC 400}, and ***Associated Construction vs. Parwanhans Helicopters Pvt. Ltd.*** {(2008) 16 SCC 128}. In this view of the matter, the applicant has been left with no option but to approach this Hon'ble Court for appointment of an arbitrator.

9. Mr. Agrawal, learned counsel for the applicant submits that in a similar dispute wherein the terms of the contract were almost identical, this

Court had referred a matter to one of the retired Judge of this High Court, in ARBR No. 3 of 2021, the parties being ***M/s. Bansal-Amit (JV) v. Union of India & Others***, vide order dated 14.07.2023.

10. Mr. Ramakant Mishra, learned counsel appearing for the non-applicant submits that though return has been filed by the non-applicant denying the contentions of the applicant, however, the non-applicant would have no objection if this Court appoints any retired Judge of this High Court to act as an Arbitrator, for resolving the dispute involved herein.

11. A query was put to learned counsel appearing for the parties as to whether they are agreeable for a common name who can be appointed as Arbitrator, learned counsel for the parties submitted that they would have no objection if any retired Judge of this High Court is appointed as the Sole Arbitrator. They further submit that Hon'ble Mr. Justice Goutam Bhaduri, who is a retired Judge of this High Court may be appointed as the Sole Arbitrator.

12. In view of the above consensus between the learned counsel for the parties, Hon'ble Mr. Justice Goutam Bhaduri, a retired Judge of this High Court is appointed to act as the Sole Arbitrator to resolve the dispute involved in this arbitration request between the parties.

13. The Registry is directed to communicate this order to Hon'ble Mr. Justice Goutam Bhaduri on the proper address.

14. The remuneration of the Arbitrator shall be settled with the mutual consent of the parties.

15. The arbitration request petition, accordingly, stands allowed. No order as to costs.

Sd/-
(Ramesh Sinha)
CHIEF JUSTICE

Amit

AMIT KUMAR DUBEY
Digitally signed by AMIT KUMAR DUBEY
Date: 2024.11.19 13:04:59 +0530