

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

ARBITRATION PETITION NO. 20 OF 2022

Ghai Enterprises

...Petitioner

Versus

Union of India through The General Manager &
Ors.

...Respondents

Ms. Shobhana R. Waghmare a/w Mr. Ajay Kamble & Mr. Sanket
Yeolekar for Petitioner.

Mr. D. P. Singh for Respondents.

CORAM: DR. NEELA GOKHALE, J.

DATED: 4th January 2024

PC:-

1. The Petitioner seeks appointment of a sole Arbitrator to adjudicate all the disputes that have arisen between the parties out of the contract dated 22nd February 2018 executed by and between the parties. The Petitioner is a contractor, who had participated in a Open E-tender Notice dated 4th August 2017 for the work mentioned in the said E-tender Notice. He was declared as a successful bidder and was awarded the works contract. The Respondents are the railways through various authorities.

2. Ms. Shobhana Waghmare, learned Counsel for the Petitioner says that there is a dispute that has arisen between the parties in respect of the outstanding claims due from the Respondents to the Petitioner. She brings to my attention paragraph no. 64.(1) of the

contractor agreement, which is a arbitration clause in the contract.

The same reads thus,

“64.(1) Demand for arbitration :

64.(1) (i) In the event of any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Railway of any certificate to which the contractor may claim to be entitled to, or if the Railway fails to make a decision within 120 days, then and in any such case, but except in any of the “excepted matters” referred to in Clause 63 of these Conditions, the contractor, after 120 days but within 180 days of his presenting his final claim on disputed matters shall demand in writing that the dispute or difference be referred to arbitration.

64.(1) (ii) The demand for arbitration shall specify the matters which are in question, or subject of the dispute or difference as also the amount of claim item-wise. Only such dispute(s) or difference(s) in respect of which the demand has been made, together with counter claims or set off, given by the Railway, shall be referred to arbitration and other matters shall not be included in the reference.

64.(1)(iii)(a) The Arbitration proceedings shall be assumed to have commenced from the day, a written and valid demand for arbitration is received by the Railway.

(d) Place of Arbitration : The place of arbitration would be within the geographical limits of the Division of the Railway where the cause of action arose or the Headquarters of the concerned Railway or any other place with the written consent of both the parties.

64.(1) (iv) No new claim shall be added during proceedings by either party. However, a party may amend or supplement the original claim or defence thereof during the course of arbitration proceedings subject to acceptance by Tribunal having due regard to the delay in making it.

64.(1) (v) If the contractor(s) does/do not prefer his/their specific and final claims in writing, within a period of 90 days of receiving the intimation from the Railways that the final bill is ready for payment, he/they will be deemed to have waived his/their claim(s) and the Railway shall be discharged and released of all liabilities under the contract in respect of these claims.”

3. Paragraph no. 64.(3) of the contractor agreement deals with the appointment of Arbitrator depending on the total amount paid and value of all the claims, which reads thus,

“64.(3) Appointment of Arbitrator :

64.(3) (a)(i) In cases where the total value of all claims in question added together does not exceed Rs. 25,00,000/- (Rupees twenty-five lakhs only), the Arbitral Tribunal shall consist of a Sole Arbitrator who shall be a Gazetted Officer of Railway not below JA Grade, nominated by the General Manager. The sole arbitrator shall be appointed within 60 days from the day when a written and valid demand for arbitration is received by GM. (*Authority: Railway Board's letter no. 2012/CE-I/CT/ARB./24, Dated 22.10./05.11.2013*)

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 Officer(s) 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.

64.(3) (a)(iii) If one or more of the arbitrators appointed as above refuses to act as arbitrator, withdraws from his office as arbitrator, or vacates his/their office/offices or is/are unable or unwilling to perform his functions as arbitrator for any reason whatsoever or dies or in the opinion of the General Manager fails to act without undue delay, the General Manager shall appoint new arbitrator/arbitrators to act in his/their place in the same manner in which the earlier arbitrator/arbitrators had been appointed. Such re-constituted Tribunal may, at its discretion, proceed with the reference from the stage at which it was left by the previous arbitrator(s)."

4. Ms. Shobhana Waghmare, learned Counsel for the Petitioner says that by a letter dated 6th May 2020, the Petitioner had requested to arrange for refund of Rs. 31,95,087/-, which according to him, was deducted wrongly from his work contract. There was no reply to this letter. Thereafter a notice dated 6th September 2020 was issued by the Petitioner through his Counsel to the Divisional Railway Manager (Works) invoking the arbitration clause. Paragraph no. 4 of the said letter reads thus,

"4) My client state that, my client has already intimated to your office about deductions made in the contract no. GE/2020/PQRS/PA-LNL-PA-DD

section/1st RA dt. 06.05.2020, acknowledged by your office on 08.05.2020. The copy of the same is enclosed. Till date details of deductions and reasons for deductions are not communicated to my client aggrieved by your such action of deduction my client hereby invokes Arbitration Clause 63 and 64 and requested to adjudicate the disputes in the contract through Sole Arbitrator, within 15 days failing which my client will be left with no alternative but to approach Hon'ble High Court for remedy.”

5. There is a reply notice dated 7th September 2020 disputing the claim raised by the Petitioner. There is some correspondence thereafter between the parties, but the dispute has not been resolved till date.

6. On instructions, both the learned Counsels agreed for appointment of a sole Arbitrator, instead of a panel of three Arbitrators, as mentioned in the agreement.

7. In the circumstances, the dispute arisen between the parties and pursuant to the arbitration clause in the agreement, I pass the following order :

ORDER

- a. **Ms. Vrishali Vaidya**, Advocate is appointed as a Sole Arbitrator to enter reference and adjudicate the disputes between the parties out of the Agreement dated 22nd February 2018. The seat of the arbitration shall be Pune as agreed by the parties in the clause 64.(3) of the agreement.

- b. The learned Sole Arbitrator shall forward a statement of disclosure as per the requirement of Section 12(1) of Arbitration and Conciliation Act, 1996 to the Prothonotary and Senior Master of this Court to be placed on record of this petition with a copy forwarded to both the parties.
- c. At the first instance the parties shall appear before the learned Arbitrator within a period of ten days from the date of uploading of this order or on such date that may be fixed by the Sole Arbitrator.
- d. All contentions of the parties on merits of the disputes are expressly left open.
- e. The fees payable to the Arbitral Tribunal shall be in accordance with the Bombay High Court (Fee payable to the Arbitrator) Rules, 2018 which shall be borne by the parties in equal proportion.
- f. The petition is disposed of in the above terms. There will be no order as to costs.
- g. Office to forward a copy of this order to the learned Sole Arbitrator on the following address :

2, Shubham Apartment, Ground Floor, F.P. No. 95/C, Erandwane, Kanchan Galli, Off Law College Road, Pune – 411 004.

E-mail ID : vrishalivaidya09@gmail.com

(DR. NEELA GOKHALE, J.)