



Arb.O.P (Com.Div.) No.573 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.04.2024

CORAM

THE HON'BLE Mr. JUSTICE KRISHNAN RAMASAMY

Arb.O.P (Com.Div.) No.573 of 2023

Tuaman Engineering Limited,
Fortuna Tower, 8th Floor,
23A Netaji Subhas Road,
Suit -16, Kolkata 700 001.

... Petitioner

Vs.

- 1.The General Manager,
Southern Railway,
Railway Planning Division,
Chennai – Thiruttani – Renigunta Highway,
NGO Annexe, George Town,
Chennai, Tamil Nadu 600 003.
- 2.The Principal Chief Mechanical Engineer,
6th Floor, Southern Railway, Park Town,
Chennai, Tamil Nadu 600 003.
- 3.The Chief Workshop Manager,
Central Workshops, Southern Railway,
Golden Rock (Ponmalai),
Tiruchirapalli 620 004.



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4.The Deputy Chief Mechanical Engineer,
Carriage & Wagon Production,
Central Workshops, Southern Railway,
Golden Rock (Ponmalai),
Tiruchirapalli 620 004.

... Respondents

Arbitration Original Petition filed under Section 11(6) of the
Arbitration and Conciliation Act, 1996 to

- a) confirm the appointment of Mr.Aryak Dutt,
Advocate, High Court, Calcutta as the Sole Arbitrator; or
- b) in the alternative, appoint an independent and
impartial Arbitrator on behalf of the Respondents who along
with the petitioner's nominee, Mr.Aryak Dutt, will constitute
and appoint a Presiding/3rd Arbitrator to adjudicate the
disputes between the petitioner and the Respondents in terms
of the Arbitration Agreement dated 18.04.2023;
- c) direct the Respondents to pay costs of this petition to
the petitioner;

For Petitioner : Mr.K.Manoj Menon,
for M/s.Menon Karthick

For Respondents : Mr.A.Kumaraguru, SCGSC



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ORDER

This petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter called as “the Act”) to appoint an Arbitrator to adjudicate the dispute between the petitioner and the Respondents.

2. The learned counsel for the petitioner would submit that the petitioner and the Respondents had entered into a Contract dated 18.04.2023 for production mix No.3 – Manufacture, Fitment and Welding of BOXNHL wagon under frames including supply of CRF Sections, CBC with draft gear arrangement, striker castings, backstops, consumables and accessories with post forming of centre still alignment of holes and centre sill sticker castings for 250 BOXNHL wagons. The total value of the Contract is a sum of Rs.15 Crore. However, the Respondents had terminated the said contract on 27.07.2023 stating that the petitioner have not completed the work. However, according to the petitioner, they are not in a position to complete the work, since the Respondents had not provided the space.



3. Further, he would contend that prior to the wrongful termination of the Contract by the Respondents, the petitioner had arranged labour, materials, etc., due to which, the petitioner had suffered heavy loss and hence, they are entitled for compensation of a sum of Rs.15 Crore. Under these circumstances, since the dispute between the parties is arbitrable as per Clause 64 of the Contract, the petitioner sent a notice dated 16.03.2024 by nominating the Mr.Aryak Dutt, Advocate, Arbitrator. However, the said nomination was not accepted by the Respondents. Hence, the present petition has been filed.

4. The learned counsel appearing for the Respondents would submit that as per the clause 64(3)(b)(ii) of the Contract, only the Officials mentioned in the said Clause can be appointed as Arbitrator. The relevant portion of the Contract is extracted hereunder:

“64(3)(b)(ii) In cases where the total value of all claims in question added together exceed 50,00,000/- (Rupees Fifty Lakh), the Arbitral Tribunal shall consist of a Panel of three (3) retired Railway Officer, retired not below the rank of Senior Administrative Grade Officer, as the



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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 General Manager.”

5. In reply, the learned counsel for the petitioner would submit that the persons referred at Clause 64(3)(b)(ii) of the Contract are interested person and hence, appointing them as an Arbitrator would be against the provisions of Schedule V and VII of the Act and also against the law laid down by the Hon'ble Apex Court in “**Perkins Eastman Architects DPC Vs. HSCC (India) Ltd.**” reported in **2019 SCC OnLine SC 1517**.

6. The learned counsel for the Respondents is also in agreement with the above legal position. Thus, he requests this Court to appoint an Arbitrator, in terms of the provisions of the Act and law laid down by the Hon'ble Apex Court, to adjudicate the dispute between the parties.



7. Heard the learned counsel for the petitioner and the Respondents

and perused the materials available on record.

8. In the present case, upon perusal of the Contract dated 18.04.2023, it is clear that the dispute among the parties shall be resolved by virtue of Arbitration as per the Clause 64 of the said Contract, which reads as follows:

“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 63.1 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)(a): 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 or difference, 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)(ii)(b): The parties may waive off the applicability of Sub-Section 12(5) of Arbitration and Conciliation (Amendment) 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.

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.

64.(1)(iii)(b): The claimant shall submit his claims stating the facts supporting the claims alongwith all the relevant documents and the relief or remedy sought against each claim within a period of 30 days from the date of appointment of the Arbitral Tribunal.

64.(1)(iii)(c): The Railway shall submit its defence statement and counter claim(s), if any, within a period of 60



days of receipt of copy of claims from Tribunal, unless otherwise extension has been granted by Tribunal.

64.(1)(iii)(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 defense 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 aymment, 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.

64.(2): Obligation During Pendency of Arbitration: Work under the contract shall, unless otherwise directed by the Engineer, continue during the arbitration proceedings, and no payment due or payable by the Railway shall be



withheld on account of such proceedings, provided, however, it shall be open for Arbitral Tribunal to consider and decide whether or not such work should continue during arbitration proceedings.

64.(3): Appointment of Arbitrator:

64.(3)(a): Appointment of Arbitrator where applicability of section 12 (5) of Arbitration and Conciliation Act has been waived off:

64. (3)(a)(i) : In cases where the total value of all claims in question added together does not exceed 1,00,00,000/- (Rupees One Crore), the Arbitral Tribunal shall consist of a Sole Arbitrator who shall be a Gazetted Officer of Railway not below Junior Administrative 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 General Manager.

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 Junior Administrative Grade or 2 Railway Gazetted Officers not below Junior Administrative Grade and a retired Railway Officer, retired not below the rank of Senior Administrative



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Grade Officer, as the arbitrators. For this purpose, the Railway will send a panel of at least four (4) 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 General Manager.

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. General Manager 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 Senior Administrative Grade of other departments of the Railway for the purpose of appointment of arbitrator.

64.3.(a).iii: The serving railway officer working in arbitral tribunal in the ongoing arbitration cases as per clause 64.(3)(a)(i) and clause 64.(3)(a)(ii) above, can continue as arbitrator in the tribunal even after his retirement.

64.(3)(b): Appointment of Arbitrator where applicability of Section 12 (5) of Arbitration and Conciliation Act has not been waived off:

(i) In cases where the total value of all claims in question added together does not exceed ₹50,00,000/- (Rupees Fifty Lakh), the Arbitral Tribunal shall consist of a Retired Railway Officer, retired not below the rank of Senior Administrative Grade Officer, as the arbitrator. 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 dates to the Contractor within 60 days from the day when a written and valid demand for arbitration is received by the General Manager.

Contractor will be asked to suggest to General



Manager at least 2 names out of the panel for appointment as arbitrator 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 arbitrator within 30 days from the receipt of the names of Contractor's nominees.

(ii) In cases where the total value of all claims in question added together exceed ? 50,00,000/- (Rupees Fifty Lakh), the Arbitral Tribunal shall consist of a Panel of three (3) retired Railway Officer, retired not below the rank of Senior Administrative Grade 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 General Manager.

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



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the panel, duly indicating the 'Presiding Arbitrator' from amongst the 3 arbitrators so appointed. General Manager 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.

64.(3)(c)(i): 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 bitrator/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).

64.(3) (c) (ii): (a) The Arbitral Tribunal shall have power to call for such evidence by way of affidavits or otherwise as the Arbitral Tribunal shall think proper, and it



shall be the duty of the parties hereto to do or cause to be done all such things as may be necessary to enable the Arbitral Tribunal to make the award without any delay. The proceedings shall normally be conducted on the basis of documents and written statements.

(b) Before proceeding into the merits of any dispute, the Arbitral Tribunal shall first decide and pass its orders over any plea submitted/objections raised by any party, if any, regarding appointment of Arbitral Tribunal, validity of arbitration agreement, jurisdiction and scope of the Tribunal to deal with the dispute (s) submitted to arbitration, applicability of time 'limitation' to any dispute, any violation of agreed procedure regarding conduct of the arbitral proceedings or plea for interim measures of protection and record its orders in day to day proceedings. A copy of the proceedings duly signed by all the members of tribunal should be provided to both the parties.

64.3(c)(iii): (i) Qualification of Arbitrator (s):

(a) Serving Gazetted Railway Officers of not below JA Grade level.

(b) Retired Railway Officers not below SA Grade level, one year after his date of retirement.

(c) Age of arbitrator at the time of appointment shall



be below 70 years.

(ii) An arbitrator may be appointed notwithstanding the total number of arbitration cases in which he has been appointed in the past.

(ii) While appointing arbitrator(s) under Sub-Clause 64. (3)(a)(i) , 64. (3)(a)(ii) 64. (3)(b)(i) & 64.(3)(b)(ii) above, due care shall be taken that he/they is/are not the one/those who had an opportunity to deal with the matters to which the contract relates or who in the course of his/their ties as Railway servant(s) expressed views on all or any of the matters under dispute or differences. A certification to this effect as per annexure- XVI shall be taken from Arbitrators also. The proceedings of the Arbitral tribunal or the award made by such Tribunal will, however, not be invalid merely for the reason that one or more arbitrator had, in the course of his service, opportunity to deal with the matters to which the contract relates or who in the course of his/their duties expressed views on all or any of the matters under dispute.

64. (3)(d)(i) : The arbitral award shall state item wise, the sum and reasons upon which it is based. The analysis and reasons shall be detailed enough so that the award could be inferred therefrom.



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64.(3)(d)(ii): A party may apply for corrections of any computational errors, any typographical or clerical errors or any other error of similar nature occurring in the award of a Tribunal and interpretation of a specific point of award to Tribunal within 60 days of receipt of the award.

64.(3)(d)(ii): A party may apply to Tribunal within 60 days of receipt of award to make an additional award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

64.(4): In case of the Tribunal, comprising of three members, any ruling on award shall be made by a majority of members of Tribunal. In the absence of such a majority, the views of the Presiding Arbitrator shall prevail.

64.(5): Where the arbitral award is for the payment of money, no interest shall be payable on whole or any part of the money for any period till the date on which the award is made.

64. (6): The cost of arbitration shall be borne by the respective parties. The cost shall inter-alia include fee of the arbitrator(s), as per the rates fixed by Railway Board from time to time and the fee shall be borne equally by both the parties, provided parties sign an agreement in the format given at Annexure XV to these conditions after/ while



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referring these disputes to Arbitration. Further, the fee payable to the arbitrator(s) would be governed by the instructions issued on the subject by Railway Board from time to time irrespective of the fact whether the arbitrator(s) is/are appointed by the Railway Administration or by the court of law unless specifically directed by Hon'ble court otherwise on the matter.

64.(7) Subject to the provisions of the aforesaid Arbitration and Conciliation Act 1996 and the rules thereunder and relevant para of the Standard General Conditions of Contract and any statutory modifications thereof shall apply to the appointment of arbitrators and arbitration proceedings under this Clause.

64.(8) In case arbitration award is challenged by a party in the Court of Law, 75% of award amount, pending adjudication by Court of Law, shall be made by party to other party. In case payment is to be made by Railway to Contractor, the terms & conditions as incorporated in the Ministry of Railways letter No. 2016/CE(I)/CT/ARB/3(NITI Aayog)/Pt. dated 08th Mar, 2017 as amended from time to time, shall be followed. In case Contractor has to pay to the Railway, then 75% of the award amount shall be deducted by the Railway from the Contractor's bills, Performance



Guarantee/ Security Deposit or any other dues of Contractor with the Government of India.”

9. A reading of the above Clause, particularly Clause 64(3)(b)(ii), it appears that it was agreed by both the parties that if the claim exceed a sum of Rs.50 Lakhs and above, the retired Railway Officers would be nominated by the respective parties to adjudicate the dispute.

10. There is no dispute on the aspect that when the parties have agreed something, the same should not be beyond the scope of the provisions of the Act and the law laid down by the Hon'ble Apex Court. However, in the present case, the agreement of the parties are contrary to the provisions of the Schedule V(1) of the Act, wherein it has been stated as follows:

“The following grounds give rise to justifiable doubts as to the independence or impartiality of arbitrators:

1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.”



11. A reading of the above provision would make it clear that appointment of any person referred in the Schedule V(1) of the Act, would be construed as ground for raising the justifiable doubt with regard to the independence and impartiality of the Arbitrator.

12. In the present case, the persons named for the panel of Arbitrators in the above Clause 64 are their past employees, who were in the higher positions and they were fully into the business relationship with the Respondents while performing their duty on behalf of the Company. The term “business relationship” refers to working and supporting for the business of the respective company, in which case, the persons nominated at Clause 64(3)(b)(ii) would be considered to have a past business relationship with the parties and appointing the said persons as Arbitrator would be a ground to raise the justifiable doubts as to the independence and impartiality of the Arbitrator. In such case, those persons cannot be appointed since they are interested persons in terms of provisions of the Act and hence they are ineligible to be appointed as Arbitrator. Accordingly, the terms of the



agreement entered between by the parties is contrary to the provisions of
Schedule V(i) of the Act.

13. Further, such appointment is also against the law laid down by the Hon'ble Apex Court in *Perkins case* (referred supra). When such being the case, considering the submissions made by the learned counsel for the petitioner and in view of the fact that the dispute between the petitioner and the Respondents squarely falls within the purview of the Clause 64 of the Contract dated 18.04.2023, this Court is inclined to appoint an Arbitrator.

14. In the present case, by virtue of invoking Arbitration Clause, the petitioner had sent a notice dated 16.10.2023, wherein, they raised the dispute and made a claim for more than a sum of Rs.15 Crores and also informed about the damages sustained by them due to the illegal termination. Hence, as stated above, the present dispute is squarely falls within the purview of the Contract dated 18.04.2023 and the same can be adjudicated by the Arbitrator appointed by this Court. Therefore, this Court



is inclined to appoint an Arbitrator to adjudicate the disputes between the parties.

15. Accordingly, this Court feels it appropriate to pass the following order:

i) **The Hon'ble Mr.Justice N.Paul Vasanthakumar, Former Chief Justice, High Court of Jammu & Kashmir, residing at “ASHIRVADH”, No.24-A, II Street, Kamaraj Avenue, Adyar, Chennai 600020, Phone No.94443 90958,** is appointed as sole arbitrator to enter upon reference and adjudicate the disputes *inter se* the parties

ii) The learned Arbitrator appointed herein, shall after issuing notice to the parties and upon hearing them, pass an award as expeditiously as possible, preferably within a period of six months from the date of receipt of the Order. The learned Arbitrator is also directed to decide the matter without influenced by the observations made by this Court in the present order.

iii) The learned Sole Arbitrator appointed herein shall be paid fees and other incidental charges, as per Schedule IV of the Act and the same shall be borne by the parties equally. In the event of non-appearance of the Respondents, the petitioner shall bear the entire remuneration and other expenses and



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thereafter, the petitioner can recover the same directly from the Respondents and vice versa.

16. This Arbitration Original Petition is ordered accordingly, leaving the parties to bear their own costs. Since this Court has appointed an Arbitrator, it is open to the petitioner as well as the Respondents to seek other reliefs under the provisions of Arbitration and Conciliation Act 1996 before the Arbitrator.

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Speaking/Non-speaking order
Index : Yes / No
Neutral Citation: Yes / No
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