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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **O.M.P. (T) (COMM.) 10/2022**

M/S BALWINDER SINGH SAINI

..... Petitioner

Through: Mr. Vipin Kumar, Mr. Dharmendra
Kumar and Mr. R.R. Maurya,
Advocates.

versus

THE GENERAL MANAGER NORTHERN RAILWAY

..... Respondent

Through: Ms. Nidhi Raman, CGSC with Mr.
Zubin Singh and Mr. Akash Mishra,
Advocates.

CORAM:

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

ORDER

08.02.2024

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By way of the present petition filed under section 14(2) read with section 14(1)(A) of the Arbitration & Conciliation Act 1996 ('A&C Act'), the petitioner seeks termination of the mandate of the incumbent Sole Arbitrator, appointed by the respondent/General Manager, Northern Railways, in relation to disputes that are stated to have arisen between the parties from contract No. 197-S/147/TRS-Wheel/TKD/11/MC-IV dated 03.01.2012 ('contract').

2. Notice on this petition was issued on 19.01.2022.
3. Replies dated 01.08.2022 and 17.04.2023; and rejoinders dated 31.10.2022 and 26.07.2023 have been filed in the matter.



4. The petitioner contends that the action of the respondent of nominating an arbitrator, who is a former officer of the Northern Railways from a panel of arbitrators maintained by them; and then offering to the petitioner to pick 02 names from a list of 04 names forwarded to him, from amongst whom, it is again the General Manager of the respondent who would pick the final name for the *petitioner's nominee* Arbitrator on the panel, is illegal and unacceptable.
5. Mr. Vipin Kumar, learned counsel appearing for the petitioner submits, that the procedure for appointment of the arbitral tribunal is illegal, and therefore the mandate of the arbitrators appointed requires to be terminated.
6. Though the petitioner has raised other contentions and grievances in the petition, Ms. Nidhi Raman, learned Central Government Standing Counsel ('CGSC') appearing on behalf of the respondent points-out, that in compliance with the arbitration agreement between the parties, the respondent had sought from the petitioner waiver of the provisions of section 12(5) of the A&C Act, which was declined by the petitioner *vide* communication dated 31.01.2017.
7. Ms. Raman submits, that by reason of such refusal, the respondent adopted the procedure for appointment contained in clause 64(3)(b) of the General Conditions of Contract ('GCC') governing the transaction between the parties which reads as under :

"64.(3)(b) : Appointment of Arbitrator where applicability of section 12(5) of A&C Act has not been waived off :

The Arbitral Tribunal shall consist of a Panel of three (3) retired Railways Officer, retired not below the rank of SAG Officer,



as the arbitrators. For this purpose, the Railways will send a panel of at least four (4) names of retired Railways Officer(s) empanelled to work as Railways 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 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 Railways. 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 has served in the Accounts Department."

8. It is further argued that the procedure for appointment as contained in clause 64(3)(b) of the GCCs is squarely covered in the respondent's favour by the decision of the Supreme Court in ***Central Organisation for Railways Electrification vs. ECI-SPIC-SMO-MCML(JV), A Joint Venture Company***¹, in particular paras 37, 38 and 39 thereof, in which case this very provision, viz. clause 64(3)(b) of the GCCs has been upheld by the Supreme Court as being valid. The said paras are extracted below:

"37. Clause 64(3)(b) of GCC deals with appointment of arbitrator where applicability of Section 12(5) of the Act has not been waived off. In terms of Clause 64(3)(b) of GCC, the Arbitral Tribunal shall consist of a panel of three retired railway officers retired not below the rank of Senior Administrative Grade Officers as the arbitrators. For this purpose, the Railways will send a panel

¹ (2020) 14 SCC 712



of at least four names of retired railway officers empanelled to work as arbitrators indicating their retirement date to the contractor within sixty days from the date when a written and valid demand for arbitration is received by the General Manager. The contractor will be asked to suggest the General Manager at least two names out of the panel for appointment of contractor's nominees within thirty days from the date of dispatch of the request of the Railways. The General Manager shall appoint at least one out of them as the contractor's nominee and will simultaneously appoint the remaining arbitrators from the panel or from outside the panel, duly indicating the "presiding officer" from amongst the three arbitrators. The exercise of appointing the Arbitral Tribunal shall be completed within thirty days from the receipt of names of contractor's nominees. Thus, the right of the General Manager in formation of the Arbitral Tribunal is counterbalanced by the respondent's power to choose any two from out of the four names and the General Manager shall appoint at least one out of them as the contractor's nominee.

“38. In the present matter, after the respondent had sent the letter dated 27-7-2018 calling upon the appellant to constitute the Arbitral Tribunal, the appellant sent the communication dated 24-9-2018 nominating the panel of serving officers of Junior Administrative Grade to act as arbitrators and asked the respondent to select any two from the list and communicate to the office of the General Manager. By the letter dated 26-9-2018, the respondent conveyed their disagreement in waiving the applicability of Section 12(5) of the Amendment Act, 2015. In response to the respondent's letter dated 26-9-2018, the appellant has sent a panel of four retired railway officers to act as arbitrators giving the details of those retired officers and requesting the respondent to select any two from the list and communicate to the office of the General Manager. Since the respondent has been given the power to select two names from out of the four names of the panel, the power of the appellant nominating its arbitrator gets counterbalanced by the power of choice given to the respondent. Thus, the power of the General Manager to nominate the arbitrator is counterbalanced by the power of the respondent to select any of the two nominees from out of the four names suggested from the panel of the retired officers. In view of the modified Clauses 64(3)(a)(ii) and 64(3)(b) of GCC, it cannot therefore be said that the General Manager has become ineligible to act as (sic nominate) the arbitrator. We do not find any merit in the contrary contention of the respondent. The decision in TRF Ltd. is not applicable to the present case.



“39. There is an express provision in the modified clauses of General Conditions of Contract, as per Clauses 64(3)(a)(ii) and 64(3)(b), the Arbitral Tribunal shall consist of a panel of three gazetted railway officers [Clause 64(3)(a)(ii)] and three retired railway officers retired not below the rank of Senior Administrative Grade Officers [Clause 64(3)(b)]. When the agreement specifically provides for appointment of the Arbitral Tribunal consisting of three arbitrators from out of the panel of serving or retired railway officers, the appointment of the arbitrators should be in terms of the agreement as agreed by the parties. That being the conditions in the agreement between the parties and the General Conditions of the Contract, the High Court was not justified in appointing an independent sole arbitrator ignoring Clauses 64(3)(a)(ii) and 64(3)(b) of the General Conditions of Contract and the impugned orders cannot be sustained.”

9. Ms. Raman further argues, that though the decision of the 03-Judge Bench of the Supreme Court in *CORE* (supra) has been referred to a larger Bench, in light of the observations expressed by the Supreme Court in *Union Territory of Ladakh & Ors. vs. Jammu & Kashmir National Conference & Anr.*², this court is now mandated not to await the decision of any reference or review; and accordingly, the position of law is as enunciated in *CORE* (supra).
10. A perusal of the record bears-out the submissions made by the learned CGSC. There is also no cavil with the position of law, in particular as to interpretation of clause 64(3)(b) of the GCCs, as articulated by her. Therefore, it is not available to the petitioner to contend that the procedure for appointment of the arbitral tribunal, as adopted by the respondent, is invalid or illegal.

² 2023 SCC OnLine SC 1140



11. In the circumstances, this court finds no merit in the petition; which is accordingly dismissed.
12. Pending applications, if any, also stand disposed-of.

ANUP JAIRAM BHAMBHANI, J

FEBRUARY 8, 2024/ak