



2024:DHC:9140



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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of Decision: 26.11.2024+ ARB.P. 1782/2024

JAGTAJI INFRASTRUCTURE

.....Petitioner

Through: Mr. Animesh Khandelwal, Adv.

versus

NORTHERN RAILWAY

.....Respondent

Through: Mr. Balendu Shekhar, CGSC along
with Mr. Krishna Chaitanya, Mr. Raj
Kumar Maurya and Ms. Tanisha
Samanta, Advs.

CORAM:

HON'BLE MR. JUSTICE SACHIN DATTA

SACHIN DATTA, J. (ORAL)

1. The present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred as '*the A&C Act*') seeks appointment of a Sole Arbitrator to adjudicate the disputes between the parties. These disputes stem from an agreement bearing no. 399-Acs-C-LHS-DSA-SMQL-TPZ-TKJ dated 25.05.2016. As per the agreement the petitioner was required to construct "*Road Under Bridge/Limited Height subway of RDSO design by cut and cover method in lieu of LC no. C-131, C-132 and C-136 (03 nos.) on DSA - SMQL -TPZ section of Delhi Division*". The contract value was of ₹ 5,03,41,925.48/- which was subsequently enhanced to ₹ 6,48,95,967.37 vide "*first Addendum-Corrigendum*".



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2. The relevant conditions of contract contained an arbitration clause as under: -

“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 Rs. 1,00,00,000 (Rupees One Crore only), the Arbitral Tribunal shall consist of a Sole Arbitrator who shall be 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 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 date 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 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) (b): Appointment of Arbitrator where applicability of section 12(5) of Arbitration and Conciliation Act has not been waived off:

The Arbitral Tribunal shall consist of a panel of three (3) retired Railway Officers, retired not below the rank of SAG 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 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 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 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).*

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 Arbitral Tribunal should record day to-day proceedings. The proceedings shall normally be conducted on the basis of documents and written statements.*

(b) *Before proceeding in to the merits of any dispute, the Arbitral Tribunal shall first decide and pass its orders over any plea submitted/rejections raised by any party, if any, regarding appointment*



of Arbitral Tribunal, validity of arbitration agreement, jurisdictions 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 proceeding duly signed by all 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

(iii) While appointing arbitrator(s) under Sub-clause 64.(3)(a) (i), 64.(3)(a) (ii) & 64.(3)(b)

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 duties as Railway servant(s) expressed views on all or any of the matters under dispute or differences. 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 there from.

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)(iii) 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)

(a) 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 II to these condition after/ while 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.

(b) (i) Sole Arbitrator shall be entitles for 25% extra fee over the fee prescribed by Railway Board from time to time.

(ii) Arbitral Tribunal shall be entitled to 50% extra fee if Award is decided within 6 months.

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

3. It is submitted that after the completion of the work, the respondent released the FDR amount of ₹25,17,100 in favour of the petitioner and a completion certificate was issued on 08.06.2020. However, the disputes between the parties arose with respect to the processing of final bill and release of the Security Deposit.



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4. Various communications were sent by the petitioner to the respondent requesting the release of pending payments, including the security deposit. However, the request of the petitioner was not acceded to.

5. The petitioner alleges that the final bill payment was wrongly withheld and therefore under financial duress, the petitioner was compelled to sign the “second and final Addendum-Corrigendum” dated 12.05.2021 along with a ‘no claim certificate’. It is the case of the petitioner that second and final Addendum-Corrigendum was issued 25 months after the completion of the work, which is in contravention of applicable railway circulars as per which the addendum could be issued only during the execution of the work. It is also the case of the petitioner that contract value was unilaterally reduced to ₹5,45,16,744.38, which the petitioner was forced to accept under protest.

6. Aggrieved with non-payment of dues and unresolved disputes, the petitioner invoked the arbitration clause via letter dated 01.09.2023, thereby raising 24 claims.

7. The respondent replied to the invocation notice vide letter dated 19.06.2024 thereby stating as under –

“In reference to above subject, it is intimated that the above said work has been physically completed on 30.04.2019. And final agreement value has already been sanctioned by competent authority. Therefore, you are requested to submit GST Invoices of the final contractual bill and final PVC bill to our office You are also requested to upload your agency's details on IREPS to enable this office to process the bills further to Associate Accounts office for audit and arranging payment.”



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8. The petitioner has now approached this Court, through the present petition, seeking the appointment of a Sole Arbitrator to adjudicate the dispute.

9. Learned counsel for the respondent does not dispute the existence of the arbitration agreement. As such, in terms of the judgment of the Supreme Court in *In Re: Interplay between Arbitration Agreement under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899*, 2023 SCC OnLine SC 1666 and *SBI General Insurance Co. Ltd. v. Krish Spinning*, 2024 INSC 532, there is no impediment to constituting an arbitral tribunal to adjudicate the disputes between the parties.

10. Moreover, it is incumbent on this Court to appoint an independent Sole Arbitrator in terms of judgments of the Supreme Court in *Perkins Eastman Architects DPC v. HSCC (India) Ltd* (2020) 20 SCC 760, *TRF Limited v. Energo Engineering Projects Ltd*, (2017) 8 SCC 377, *Bharat Broadband Network Limited v. United Telecoms Limited.*, 2019 SCC OnLine SC 547; and judgment/s of this Court in *M/s. M.V. Omni Projects (India) Ltd. V. Union of India, Through Dy. Chief Engineer/Const.-II/Northern Railway* 2024:DHC:7874.

11. Learned counsel for the respondent accedes that an independent Sole Arbitrator be appointed by this Court to adjudicate the disputes between the parties.

12. Accordingly, Justice (Retd.) Najmi Waziri, Former Judge, Delhi High Court (Mob. No.: +91 9810097311) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.



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13. The respondent shall be entitled to raise preliminary objections as regards jurisdiction/arbitrability, which shall be decided by the learned arbitrator, in accordance with law.
14. The learned Sole Arbitrator may proceed with the arbitration proceedings subject to furnishing to the parties requisite disclosure as required under Section 12 of the A&C Act.
15. At request of respective counsel, it is directed that the arbitration shall take place under the aegis of and under the rules of the Delhi International Arbitration Centre (DIAC).
16. All rights and contentions of the parties in relation to the claims/counter claims are kept open, to be decided by the learned Sole Arbitrator on their merits, in accordance with law.
17. Needless to say, nothing in this order shall be construed as an expression of opinion of this court on the merits of the case.
18. The present petition stands disposed of in the above terms.

SACHIN DATTA, J

NOVEMBER 26, 2024/sv