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

+ **ARB.P. 1840/2024**

M/S B S SANGWAN

.....Petitioner

Through: **Mr. S. W. Haider, Adv.**

versus

UNION OF INDIA

.....Respondent

Through: **Mr. Vineet Dhanda, CGSC with Mr. Saksham Sethi and Ms. Shweta Shanoilya, Advs.**

CORAM:

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

ORDER

% **23.12.2024**

1. The present petition under Section 11 of the Arbitration and Conciliation Act, 1996 ['Act of 1996'], has been filed by the Petitioner – M/s B S Sangwan, seeking appointment of an Arbitral Tribunal to adjudicate the disputes between the parties in terms of Clause 64 of the General Clauses of Contract, 2014 ['GCC'], as applicable to the parties herein.
2. It is stated that work pertaining to 'Doubling of Alamnagar-Utratia section' on Lucknow Division in Northern Railway was awarded to the Petitioner by the Respondent and accordingly, the parties herein had entered into an agreement dated 10.01.2019 ['the Agreement'].
3. It is stated that disputes relating to payment of final bill and release of security deposits has arisen between the parties in respect of the aforesaid Agreement and therefore, the Petitioner invoked the arbitration agreement in terms of Clause 64 of GCC vide its letter dated 08.08.2024. It is stated that



the said notice has not been responded to by the Respondent and in these circumstances, the Petitioner has been constrained to approach this Court under Section of the Act of 1996.

4. It is stated by the learned counsel for the Petitioner that the value of the Petitioner's claim is approximately Rs. 10 crores. He prays that a sole Arbitrator be appointed by this Court. He states that the Petitioner would pray for an appointment of Retd. Judge of this Court.

5. The Court has heard learned counsel for the Petitioner and perused the record.

6. The Arbitration clause i.e., Clause 64 of GCC clearly stipulates that all claims or disputes arising out of the Agreement shall be resolved through Arbitration. Further, the said Arbitration clause, more specifically, Clause 64(3)(a)(ii) provides that in case total value of claims in question added together exceeds Rs. 25 Lakhs, the Arbitral Tribunal shall consists of 3 members. The Clause 64 of GCC reads as under: -

“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.(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 lakh 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.

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.

...

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. 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 any statutory modifications thereof shall apply to the arbitration proceedings under this Clause."

(Emphasis Supplied)

7. The matter was first listed on 22.11.2024, on which date, the Respondent had sought and was granted one weeks' time to take instructions with regard to appointment of an Arbitral Tribunal.

8. Today, the learned counsel for the Respondent has handed over a letter dated 12.12.2024 issued by the Deputy Chief Engineer of Northern Railway (Construction Organisation) to the Petitioner herein. He states that by way of said letter the Respondent had informed the Petitioner that for



appointment of a Sole Arbitrator/Arbitral Tribunal, the Petitioner is required to waive off the provisions of Sections 12(5) and 31(5) of the Act of 1996 by filing up Annexure-XII, enclosed with the said letter.

9. In response, the learned counsel for the Petitioner states that the Petitioner is not willing to waive the allegation of bias against the unilaterally appointment of Arbitrators by the Respondent and submits that this Court may appoint the Arbitral Tribunal in terms of the judgment passed by the Supreme Court in **Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV) A Joint Venture Co.**¹. He further submits that the claimed amount is Rs. 10 Crores approximately.

10. Learned counsel for the Respondents state that he has instructions to consent to the appointment of a Retd. Judge of this Court being appointed as an Arbitrator and the Respondents waive the condition of qualification stipulated in Clause 64.3(a)(ii). He states however, Respondent does not concede to appointment of a sole Arbitrator and prays for constitution of a three (3) member tribunal as stipulated in the said clause.

11. In view of the aforesaid submissions on the constitution of the arbitral tribunal, the learned counsels for the parties submit as well as agree that two (2) out of three (3) members of the Arbitral Tribunal, be appointed by this Court and the third member, who will be the Presiding Arbitrator, to be appointed by such two arbitrators. The parties have agreed upon and submit that all the members of the Arbitral Tribunal shall be retired Judges of the High Court.

12. The parties have also agreed upon that the arbitration be conducted under the aegis of the Delhi International Arbitration Centre ('DIAC') and



be regulated by the Rules applicable to DIAC.

13. In view of the law settled by the judgments of the Supreme Court in **TRF Limited v. Energo Engineering Projects Limited**² and **Perkins Eastman Architects DPC & Anr. V. HSCC (India) Limited**³, the contractual provision for unilateral appointment of an arbitrator is impermissible. The decisions of the Supreme Court in both the said judgments have been upheld by the Supreme Court in **Central Organisation for Railway Electrification** (supra).

14. Furthermore, the Supreme Court in **Central Organisation for Railway Electrification** (supra), has held that the principle of equality of parties applies at all stages of arbitration proceedings, including the stage of appointment of arbitrators. The apex Court has held that appointing a three-member panel and requiring one party to choose the arbitrator from a curated panel of potential arbitrators violates the principle of equal treatment of the parties and this approach lacks an effective counterbalance, as the parties do not participate equally in the process of appointing arbitrators. This judgment squarely applies to clause 64.3(a) (ii) of the subject agreement.

15. This Court is, therefore, of the view that the Petitioner has made out a case for appointment of the members of the Arbitral Tribunal by this Court. The agreement between the parties contemplates a three-member Arbitral Tribunal. Accordingly, Justice Manmohan Singh (Retd.), Former Judge, High Court of Delhi, [Mob. No. 9717495001] and Justice J.R. Midha (Retd.), Former Judge of High Court of Delhi, [Mob. No. 9717495003] are

¹ 2024 SCC OnLine SC 3219 [Paras 162, 163 and 169]

² (2017) 8 SCC 377



appointed as the Arbitrators. The said two Arbitrators will mutually appoint the Presiding Arbitrator on or before 07.01.2025, who will be a Chief Justice (Retd.) and/or Justice (Retd.) of the High Court. The Arbitral Tribunal shall consist of said three members.

16. The disputes between the parties under the said agreement are referred with the following directions:

- a) The arbitral proceedings will be held under the aegis of the DIAC. The arbitral proceedings will be governed by the rules of DIAC.
- b) The remuneration of the members of the Arbitral Tribunal shall be in terms of Schedule IV of the Act of 1996, as amended by the Rules of DIAC.
- c) The Arbitrators are requested to furnish a declaration in terms of Section 12 of the Act of 1996 before entering into the reference and in the event, there is any impediment to the appointment of on that count, the parties are given liberty to file an appropriate application in this Court.
- d) As stipulated in Clause 64(6) of GCC the expenses with regard to the Arbitral proceedings will be equally borne by both the parties.
- e) The parties are directed to appear before the Arbitral Tribunal on 14.01.2025 at 04:30 P.M. through video conferencing link for preliminary hearing.

17. It is clarified that all rights and contentions of the parties, including on maintainability/arbitrability of the claims and on merits, are left open for adjudication by the Arbitrators and nothing said in this order is an expression on the merits of the case.

³ (2020) 20 SCC 760



18. With the aforesaid directions, the petition stands disposed of.
19. The registry is directed to send a copy of this order to the learned Arbitrators and Secretary, DIAC.

MANMEET PRITAM SINGH ARORA, J

DECEMBER 23, 2024/mt/MG

Click here to check corrigendum, if any