



2025:DHC:4495



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

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Date of Decision: 21st May 2025

+ ARB.P. 718/2025

M/S MAAN BUILDERS PVT. LTD.

.....Petitioner

Through: Mr. Avinash Trivedi and Mr. Rahul Aggarwal, Advocates.

versus

THE GENERAL MANAGER NORTHERN
RAILWAY

.....Respondent

Through: Mr. Vineet Dhanda, CGSC with Ms. Akansha Choudhary, Advocate.

CORAM:**HON'BLE MS. JUSTICE JYOTI SINGH****JUDGEMENT****JYOTI SINGH, J. (ORAL)**

1. This petition is filed on behalf of the Petitioner under Section 11(6) of the Arbitration and Conciliation Act, 1996 ('1996 Act') for appointment of an Arbitrator to adjudicate the disputes between the parties.
2. It is averred in the petition that Respondent awarded the work of supplying, fabrication, assembling, erection/launching of steel girder in the State of Jammu and Kashmir along with other allied work in connect with doubling of Kathua-Madhopur Punjab Section of Ferozpur Division. The stipulated date of completion of work was 11.06.2019, *albeit* the work was completed on 30.04.2022 and completion certificate was issued by the Respondent on 28.02.2023. Petitioner sent repeated reminders for release of the outstanding amount and Bank Guarantee, however, Respondent sent an



e-mail on 23.06.2023 pointing out defects in the executed work. Disputes having arisen, Petitioner invoked Arbitration Clause 64 of GCC and sought appointment of an Arbitrator but there was no response.

3. Learned counsel for the Petitioner submits that the contract in question contains an Arbitration Clause 64 of GCC, which provides that in cases where the total value of claims exceeds Rs.25 lacs, Arbitral Tribunal shall consist of panel of three Gazetted Railway Officers as Arbitrators, for which purpose Railway will send a panel of more than three names of Gazetted Railway Officers of one or more Departments of the Railways, which may also include names of retired officers empanelled to work as Railway Arbitrator, to the contractor, from which the contractor will suggest two names as contractor's nominee of which one will be appointed by the General Manager, simultaneously appointing the balance number of Arbitrators. It is argued that this arbitration clause is in the teeth of judgment of the Supreme Court in ***Central Organisation for Railway Electrification v. ECI SPIC SMO MCML (JV) A Joint Venture Company, 2024 SCC OnLine SC 321***, and thus the appointment by the Railways in terms of this clause will be a unilateral appointment.

4. Learned CGSC for the Railways does not dispute the applicability of the judgment in ***Central Organisation for Railway Electrification (supra)*** to the present case.

5. For the ease of reference, relevant part of the arbitration clause is extracted hereunder:-

“64.(3) Appointment of Arbitrator :

....

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."

6. In ***Central Organisation for Railway Electrification (supra)***, the Supreme Court was examining clause 64(3)(b) of GCC which provided that the Arbitral Tribunal shall consist of panel of three retired Railway Officers for which Railways will send a panel of at least four names of retired Railway Officers from which contractor will suggest at least two names as contractor's nominee and one of them will be appointed as Member of the Tribunal. The Supreme Court held that such an Arbitrator appointment clause is likely to give rise to justifiable doubt as to the independence and impartiality of Arbitrators for two reasons: (i) contractor is restricted to choosing its Arbitrator from the panel of four Arbitrators nominated by the party who is a disputant; and (ii) contractor's choice is further constrained because it is made subject to decision of the General Manager who will



choose one among the two persons suggested by the parties. Since the contractor has to select from a curated panel, the arbitration clause does not allow the contractor equal participation in the appointment of the Arbitrator. The Supreme Court emphasised on equal treatment of parties at the stage of appointment of an Arbitrator to ensure impartiality during arbitral proceedings. Relevant passages from the judgment are as follows:-

“129. Equal treatment of parties at the stage of appointment of an arbitrator ensures impartiality during the arbitral proceedings. A clause that allows one party to unilaterally appoint a sole arbitrator is exclusive and hinders equal participation of the other party in the appointment process of arbitrators. Further, arbitration is a quasi-judicial and adjudicative process where both parties ought to be treated equally and given an equal opportunity to persuade the decision-maker of the merits of the case. An arbitral process where one party or its proxy has the power to unilaterally decide who will adjudicate on a dispute is fundamentally contrary to the adjudicatory function of arbitral tribunals.

130. In comparison, a three-member arbitral tribunal usually allows each party to nominate one arbitrator of their choice, with the third arbitrator being appointed either by the two party-appointed arbitrators or by agreement of parties. The fact that both parties nominate their respective arbitrators gives them “a sense of investment in the arbitral tribunal.” A three-member arbitral tribunal also enhances the quality of the adjudicative deliberations and ensures compliance with due process. According to Gary Born, the major advantage of a three-member tribunal is that the parties can participate in the selection of the tribunal to the maximum extent possible.

131. In a three-member tribunal, each of the parties seeks to appoint a co-arbitrator. However, the third arbitrator is usually appointed by a process which allows equal participation of both parties in the appointment process. The equal participation of parties enables the appointment of an independent and impartial third arbitrator. Hence, any perceived tilt of an arbitrator in favour of the party which nominated that arbitrator is offset by the appointment of the third arbitrator in the course of a deliberative process involving both the arbitrators or as envisaged in the agreement between parties. Perkins (supra) rightly observed that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter-balanced by equal power with the other party. This counter-balancing will ideally



apply only in situations where the arbitrators are appointed by the parties in the exercise of their genuine party autonomy. TRF (supra) and Perkins (supra) have been relied upon by this Court on numerous occasions, including in Glock Asia-Pacific Limited v. Union of India and Lombardi Engg Ltd. v. Uttarakhand Jal Vidyut Nigam Ltd.

132. In Voestalpine (supra) and CORE (supra), one of the parties curated a panel of arbitrators and mandated the other party to select their arbitrator from the panel. Since the curation of the list is exclusively undertaken by one party, the other party is effectively excluded from the process of curating the panel from which exclusively, the appointment of an arbitrator is to be made. The other party has to mandatorily select its arbitrator from a curated panel, restricting their freedom to appoint an arbitrator of their choice. This is against the principle of equal treatment contained under Section 18. In this situation, there is no effective counter-balance because both parties do not participate equally in the process of appointing arbitrators. The party curating the panel can restrict the choice of the party only to a person who is on the panel selected by the other party and to no other person.

133. Many PSUs are regularly involved in arbitration disputes and constantly need the services of arbitrators. Such institutions often maintain a pool of potential arbitrators with the sole object of having a ready pool of qualified professionals who have committed their time and consented to act as arbitrators for fixed fees. The Arbitration Act does not prohibit parties to an arbitration agreement from maintaining a curated panel of potential arbitrators. However, the problem arises when the PSUs make it mandatory for other parties to select their nominees from the curated panel of arbitrators. When a PSU exercises its discretion to curate a panel, the very factor that the PSU is choosing only a certain number of persons as potential arbitrators and not others will raise a reasonable doubt in the mind of a fair-minded person. The PSUs may conceivably have nominated a person on the panel of potential arbitrators because they have a certain predisposition in favour of the former. This doubt is reinforced when the other party is given no choice but to select its arbitrator from the curated panel.

134. In CORE (supra), the three-member tribunal was sought to be constituted in the following manner : (i) the Railways would suggest at least four names of retired railway officers; (ii) the contractor would select two names out of the panel for appointment as their arbitrator; (iii) The General Manager (of the Railways) would thereafter choose at least one person out of the two to be appointed as the contractor's arbitrator; and (iv) The General Manager would proceed to appoint the balance arbitrators from the panel or outside the panel and also indicate the presiding arbitrator.



135. Such an arbitrator-appointment clause is likely to give rise to justifiable doubts as to the independence and impartiality of arbitrators for two reasons : (i) the contractor is restricted to choosing its arbitrator from the panel of four arbitrators nominated by the party who is a disputant; and (ii) the contractor's choice is further constrained because it is made subject to the decision of the General Manager who will choose one among the two persons suggested by the party. Since the contractor has to select its arbitrator from a curated panel, the arbitration clause does not allow the contractor equal participation in the appointment of their arbitrator. Moreover, the clause allows the General Manager to appoint the balance arbitrators from either the panel or outside the panel. Thus, the process of appointing the arbitrators is unequal because the General Manager can go beyond the panel of four potential arbitrators, while the contractor is bound by the names enlisted in the panel.

136. In a three-member tribunal, the independence and impartiality of a third or presiding arbitrator are prerequisites to the integrity of the arbitral proceedings. In *CORE* (supra), the arbitration clause allowed the General Manager to unilaterally nominate the presiding officer out of the panel of three arbitrators. The clause does not countenance any participation from the contractor in the process of appointing or nominating the presiding officer. Thus, the process of appointing and nominating the presiding officer is unequal and prejudiced in favour of the Railways. The fact that the General Manager is nominating the presiding officer gives rise to a reasonable doubt about the independence and impartiality of the entire arbitration proceedings.

137. Given the above discussion, it needs reiteration that the Arbitration Act does not prohibit PSUs from empanelling potential arbitrators. However, an arbitration clause cannot mandate the other party to select its arbitrator from the panel curated by PSUs. The PSUs can give a choice to the other party to select its arbitrators from the curated list provided the other party expressly waives the applicability of the *nemo iudex* rule.”

7. In light of the aforesaid judgment, any appointment from the curated panel prepared by the Railways in terms of Clause 64(3)(a)(ii) of GCC will be a unilateral appointment and cannot be sustained in law.

8. Accordingly, this petition is allowed appointing Mr. Sunil Gaur, former Judge of this Court (Mobile No. 9971000718), is appointed as a Sole Arbitrator to adjudicate the disputes between the parties. Arbitral



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proceedings will be held under the aegis of Delhi International Arbitration Centre ('DIAC') and as per its Rules. Fee of the Arbitrator shall be as per fee schedule of DIAC (Administrative Cost & Arbitrators' Fees) Rules 2018.

9. Learned Arbitrator shall give disclosure under Section 12 of the 1996 Act before entering upon reference.

10. It is made clear that this Court has not expressed any opinion on the merits of the case and all rights and contentions of the respective parties are left open.

11. Petition is disposed of in the aforesaid terms.

JYOTI SINGH, J

MAY 21, 2025/shivam