

OCD-10

ORDER SHEET

AP-COM/54/2024

IN THE HIGH COURT AT CALCUTTA
Ordinary Original Civil Jurisdiction
ORIGINAL SIDE
(Commercial Division)

RKD NIRAJ JV
VS
THE UNION OF INDIA

BEFORE:

The Hon'ble JUSTICE MOUSHUMI BHATTACHARYA

Date : 22nd February, 2024.

Appearance:

Mr. Pratip Mukherjee, Adv.

Mr. Ritoban Sarkar, Adv.

Mr. Surojit Basu, Adv.

Mr. Raju Mondal, Adv.

..for the petitioner

Mr. Rudraman Bhattacharya, Adv.

Mr. Sailendra Kumar Tiwari, Adv.

...for the respondent

The Court: The contentions of the parties are related to a Memorandum of Understanding dated 4th August, 2018 which was followed by a Letter of Acceptance issued by the respondent/Metro Railway on 7th December, 2018. By the said agreement, the petitioner was to execute civil engineering works from Noapara to the RCC ramp of the Airport Circular Railway track. The agreement is governed by the General Conditions of Contract of July, 2014.

The petitioner is aggrieved by the respondent terminating the agreement on 30th September, 2023. The petitioner says that the termination was illegal since it was done within the period of extension granted by the respondent in favour of the petitioner. The petitioner thereafter applied to the learned Rajarhat Commercial Court for interim protection and was granted such

protection in the form of a restraint on the respondent from encashing the bank guarantees which have been furnished by the petitioner. The petitioner thereafter invoked the arbitration agreement contained in Clause 64 of the GCC by way of a notice dated 9th November, 2023. The respondent replied to this notice on 17th November, 2023.

There is indeed a dispute between the parties but the Court must first deal with the preliminary objection taken on behalf of the respondent.

Learned counsel appearing for the respondent submits that the petitioner would be bound by Clause 64(3)(a)(ii) of the GCC which deals with appointment of Arbitrator for cases in excess of Rs.25 lakhs and envisages a Panel of three gazetted railway officers not below the rank mentioned in the said clause. Counsel submits that the petitioner must comply with the requirement of Clause 64(3)(a)(ii) and agree to the Panel of three gazetted railway officers as provided under the said clause.

Learned counsel appearing for the petitioner places two decisions passed by this Court on an identical point and also relies on the petitioner's invocation notice dated 9th November, 2023 which specifically states that the petitioner has not waived the applicability of Section 12(5) of The Arbitration and Conciliation Act, 1996.

The controversy before the Court namely whether a contractor would be bound to adhere to Clause 64(3)(a)(ii) of the GCC in terms of agreeing to arbitration under three gazetted railway officers not below the rank mentioned in the said clause was considered by this Court in *Rajpath Contractors v. Union of India*, AP/637/2023 and *M/s. Mehrotra Buildcon v. South Eastern Railway*,

AP/736/2023. Both these decisions were concerned with Clause 64(3)(a)(ii) of the GCC which provides for three names of gazetted railway officers for constituting the arbitral tribunal.

In *Rajpath Contractors*, the Court declined to accept an identical preliminary objection taken on behalf of the Railway on the ground that *Central Organisation for Railway Electrification vs. ECI-SPIC-SMO-MCML(JV)*; (2020) 14 SCC 712 of the Supreme Court was referred to a Larger Bench and is still pending decision. The Court was further of the view that all the officers were serving officers of the Eastern Railway and hence the bar of Section 12(5) of the Act read with the Schedules would squarely apply to that case.

In *Mehrotra Buildcon*, the Court also referred to *Central Organisation* and rejected the preliminary objection taken on behalf of the Railway on the same ground namely that the Clause was unilateral and there is no scope for the petitioner to make a free choice in the matter.

The petitioners in the aforesaid cases as well as this case have specifically disagreed to waive the applicability of Section 12(5) of the 1996 Act. Section 12(5) read with the Fifth and Seventh Schedules guards against interested Arbitrators or those who may have a conflict of interest with the subject-matter, counsel or party involved in the arbitration. Entry-1 of the Seventh Schedule in fact specifies that the Arbitrator's relationship with the parties or counsel or if the Arbitrator is an employee, consultant, advisor or has any past or present business relationship with a party would constitute a bar under Section 12(5) of the Act.

Besides the unilaterality of the clause i.e., Clause 64(3)(a)(ii) of the GCC, the petitioner's unequivocal statement of not agreeing to the waiver of Section 12(5) of the 1996 Act conclusively settles the issue against the respondent. The first entry of the Seventh Schedule bars appointment of Arbitrators falling within any of the circles of conflict even if the officers happen to be retired employees of the Railway.

The Court however finds no difficulty in acceding to the request made on behalf of the respondent of appointing a panel of three Arbitrators.

AP-COM/54/2024 is accordingly allowed and disposed of by appointing Mr. Rabindranath Samanta, former Judge of this High Court and Mr. Siddhartha Roy Chowdhury, former Judge of this High Court as two of the Arbitrators and Mr. Bikash Ranjan Bhattacharya, senior counsel as the presiding Arbitrator to resolve the disputes and differences between the parties subject to each of the learned Arbitrators communicating their individual consent in the prescribed form to the Registrar, Original Side of this Court within three weeks from date.

The petitioner's advocate-on-record shall communicate this order on the learned Arbitrators by 26th February, 2024 along with the requisite details of the contact person of the petitioner.

(MOUSHUMI BHATTACHARYA, J.)