

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/PETN. UNDER ARBITRATION ACT NO. 109 of 2020**

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M/S M N TRAPASIA, THROUGH PROPRIETOR MANISHBHAI NAGJIBHAI
TRAPASIYA

Versus

DIVISIONAL RAILWAY MANAGER (WA)

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Appearance:

MR ARPIT P PATEL(5497) for the Petitioner(s) No. 1

MR SIRAJ R GORI(2298) for the Respondent(s) No. 1

NOTICE SERVED for the Respondent(s) No. 2

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**CORAM: HONOURABLE THE CHIEF JUSTICE MR. JUSTICE
ARAVIND KUMAR**

Date : 28/02/2022

ORAL ORDER

1. Petitioner has sought for appointment of sole Arbitrator for adjudicating the dispute that is said to have arisen between petitioner and respondents pursuant to Agreement dated 17.01.2017.

2. Heard Mr.Arpit Patel, learned counsel appearing for the petitioner and Mr.Siraj Gori, learned counsel appearing for respondent No.1. Respondent No.2 is served and unrepresented. Perused the records.

3. A tender came to be floated by the respondent for grant of work of "Cess Repair by Contractor's own Earth at various Isolated Locations

on UP and Down Line and Associated works under jurisdiction of Divisional Engineer (South), Vadodara on Surat - Miyagam Section", with an estimated cost of Rs.2,47,77,070/-. On receiving the bids, it was found that bid offered by petitioner was lowest and petitioner was declared as L1 and as such his bid came to be accepted on 23.09.2016 and a contract came to be entered into between petitioner and respondent No.1 on 17.01.2017. On the ground of the petitioner having not fulfilled the contractual obligations, the respondent authority is said to have terminated the contract on 13.04.2018. However, petitioner has denied the cause assigned by respondents for termination of the contract was attributable to petitioner. On 14/11.09.2018 petitioner got issued a notice explaining the circumstances and sought for considering its claim for payment. On account of there being no reply, petitioner got issued a notice under Section 21 of the Arbitration and Conciliation Act, 1996 (for short "the Act") on 27.07.2019 as required under Clause 64 of the Agreement (General Conditions of Contract – GCC) calling upon the second respondent to appoint an Arbitrator. In response to

the said notice, the Deputy Chief Engineer (Works) informed the petitioner by communication dated 28.08.2019 and called upon the petitioner to submit the specified and item-wise amounts alleged to be due, resulting in petitioner issuing a notice/communication dated 02.01.2020 addressed to the second respondent whereby the details as sought for in the communication dated 28.08.2019 was furnished and the demand for referring the matter to an impartial and independent Arbitrator was sought for. As there was no reply or response from the respondents, petitioner has presented this petition under Section 11(6) of the Arbitration and Conciliation Act, 1996, seeking for appointment of sole Arbitrator.

4. It is the contention of Mr.Arpit Patel, learned counsel appearing for the petitioner that in view of Sub-section (5) of Section 12 of the Arbitration Act there is an embargo placed on the respondent to appoint its officers as Arbitrator. Hence, petitioner has prayed for an independent and sole Arbitrator being appointed to resolve the dispute between parties and as such, he prays for

petition being allowed. He would also submit that respondent has neither called upon petitioner to give consent for waiving right of petitioner accrued by virtue of Sub-section (5) of Section 12 of the Act and as such he contends that respondent has no locus to press into service any of the conditions specified in the GCC.

5. Per contra, Mr.Siraj Gori, learned counsel appearing for respondent No.1 has reiterated the averments made in the reply statement and would contend that even in absence of Sub-section (5) of Section 12 having not been waived by the petitioner, the contractual term as agreed to between the parties under Clause 64(3)(b) of the GCC provides for the respondent appointing Arbitrator as provided thereunder and said exercise though belatedly undertaken by issuance of communication on 18.03.2021 i.e. after filing of this petition, said right of the respondent cannot be taken away or construed as the respondent having waived its right under the said clause. Hence, by relying upon the following judgments, he prays for petition being dismissed :

- (i) **Union of India vs. Pradeep Vinod Construction Company**, reported in (2020) 2 SCC 464.
- (ii) **Central Organization for Railway Electrification vs. ECI-SPIC-SMO-MCML (JV) A joint Venture company**, reported in (2020) 14 SCC 712.
- (iii) **Union of India vs. Parmar Construction Company**, reported in (2019) 15 SCC 682.
- (iv) **Sp. Singla Construction Pvt. Ltd. vs. State of Himachal Pradesh**, reported in 2019 (2) SCC 488.

6. At the outset, it requires to be noticed that the issue regarding interpretation of Clause 64(3) of GCC having been referred to a Larger Bench by the Hon'ble Apex Court in the matter of **Union of India vs. M/s.Tantia Constructions Limited** in **Special Leave Petition (C) No.12670 of 2020**, disposed of on 11.01.2021 not being in dispute, this Court would not undertake the exercise of examining said issue.

7. Turning my attention to the facts on hand, it would clearly emerge therefrom that on receipt of notice from petitioner on 02.01.2020 by calling upon the respondent to appoint an impartial and independent Arbitrator, no steps have been taken by

respondent. It is thereafter present petition has been filed on 06.11.2020. It is thereafter respondent by communication dated 18.03.2021 called upon the petitioner to waive Sub-section (5) of Section 12 of the Arbitration and Conciliation Act, 1996, which has been refused by the petitioner by the communication (undated). It is in this background the respondent is contending that Clause 64(3)(b) would surface.

8. This Court is not inclined to accept the said submissions for reasons more than one. Firstly, the expression "notwithstanding any prior agreement to the contrary" occurring/appearing in Sub-section (5) of Section 12 is a *non-obstante* clause. This expression is normally introduced in the legislation with a view to give enacting part of the section in case of conflict and overriding effect over the provision or Act mentioned in the *non-obstante* clause. It is equivalent to saying that in spite of provision or Act mentioned in the *non-obstante* clause, the enactment following it will have its full operation or that the provisions embraced to the *non-obstante* clause will not be an impediment for the operation of the enactment.

9. The Hon'ble Apex Court in the case of **T.R.Thandur vs. Union of India**, reported in AIR 1996 SC 1643 has held that the *non-obstante* clause may be used to override any specific circumstance. Likewise in the case of **Pannalal Bansilal Pitti and others vs. State of Andhra Pradesh**, reported in AIR 1996 SC 1023, it has been held by Hon'ble Apex Court that *non-obstante* clause may be used as a legislative device to modify the ambit of provision or law mentioned in the *non-obstante* clause.

10. In the matter of **ICICI Bank Ltd. vs. SIDCO Leathers Ltd. and others** reported in AIR 2006 SC 2088, it has been held by Hon'ble Apex Court that wide amplitude of the *non-obstante* clause must be confined to the legislative policy and it can be given effect to, to the extent the parliament intended and not beyond the same.

11. In this background, when Sub-section (5) of Section 12 of the Act, 1996, is perused or read, it would clearly emerge therefrom the intendment of the parliament is not only clear and unambiguous but also specific. It would clearly indicate that if there is

any prior agreement to the contrary, that any person whose relationship with the parties or counsel or the subject-matter of dispute falls under any of the categories specified in the VII Schedule, such person who is sought to be appointed as Arbitrator would acquire disqualification for being appointed as an Arbitrator. However, if such agreement is already existing or there being any prior agreement to the said effect and subsequently if the parties so wish to waive the same, they would be at liberty to do so and the proviso to Sub-section (5) of Section 12 would come to rescue of such persons who intend to waive even though such embargo is placed under Sub-section (5) of Section 12. Until and unless this waiver takes place or this exercise of waiving the embargo placed is undertaken by the parties, it cannot be gainsaid by either of the parties that even in such circumstances there is deemed waiver by merely issuing a letter or communication calling upon the opposite party to waive rigour/embargo found in Section 12(5). However, the contract to the contrary even if any would eclipse such contract by virtue of the statutory bar contained under Sub-section (5) of

Section 12 except when there is waiver.

12. Yet another aspect which cannot go unnoticed is that hallmark of arbitration proceedings is impartiality of the Arbitrator who sits as an Arbiter to decide the dispute between the parties. In other words, the Arbitrator is required to raise above the partisan interest of parties. In **Timmins vs. Gormley**, reported in 2000 (1) All England Reporter 65, an application against a Judge was successful on the basis that the Judge had written four strongly worded articles which led the Court to conclude that an objective apprehension of bias may arise on the part of one of the parties. It has been held :

"We have found this a difficult and anxious application to resolve. There is no suggestion of actual bias on the part of the recorder. Nor, quite rightly, is any imputation made as to his good faith. His voluntary disclosure of matters already referred to show that he was conscious of his judicial duty. The views he expressed in the articles relied on are no doubt shared by other experienced commentators. We have, however, to ask, taking a broad a common sense approach, whether a person holding the pronounced pro-claimant anti-insurer views expressed by the recorder in the articles might not unconsciously have leant in favour of the claimant and against the defendant in

resolving the factual issues between them. Not without misgiving, we conclude that there was on the facts here a real danger of such a result. We do not think a lay observer with knowledge of the facts could have excluded that possibility, and nor can we. We accordingly grant permission to appeal on this ground."

13. Thus, the underlying principle of bringing an amendment to Arbitration Act by substituting Sub-section (5) of Section 12 is to provide neutrality of the Arbitrator. The person who has or was having relationship with the parties or the counsel or interest in the subject-matter of the dispute cannot be appointed as an arbitrator or continue to act as an arbitrator if already appointed.

14. In that view of the matter, this Court is of the considered view that contention raised by the respondent's counsel cannot be entertained. Insofar as the judgments relied upon by the learned counsel appearing for the respondent is concerned, it would not detain this Court for too long to arrive at a conclusion that said judgments would not come to the rescue of the respondent for the simple reason that it was rendered in the background of where the

agreement was prior to Sub-section (5) of Section 12 being brought on the statute book. Whereas in the instant case the agreement in question is of the year 2017 i.e. subsequent to the amendment.

15. Hence, for the reasons aforesaid, I proceed to pass the following

ORDER

- (i) Petition is allowed.
- (ii) Dr.Jyotsna Yagnik, Former Principal Judge, City Civil and Sessions Court, Ahmedabad, having address at: 9, Satyam Judges Bungalow, In the Lane of Vrindavan Heights, Opp. SBI, Vandematram, Gota Branch, Nr.Savy Swaraj, Gota, Ahmedabad, Mobile: 9426669100, is appointed as the sole Arbitrator to resolve the disputes between the parties in accordance with the Arbitration Centre (Domestic and International), High Court of Gujarat Rules, 2021. Both Parties would be governed by said Rules.
- (iii) Registry to communicate this order to the sole Arbitrator forthwith by Speed Post.

GAURAV J THAKER

(ARAVIND KUMAR, CJ)