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

Pronounced on: 20.12.2023

\+ **O.M.P. (T) (COMM.) 73/2022**

THE BRAITHWAITE BURN AND JESSOP CONSTRUCTION CO LTD ..... Petitioner

Through: Mr. Pinaki Addy, Adv. (through VC) and Ms. Neetu Singh, Adv.

versus

NORTHERN RAILWAY ..... Respondent

Through: Mr. Mukul Singh, CGSC alongwith Ms. Ira Singh, Adv.

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

1. This is a petition filed under Sections 14 and 15 of the Arbitration and Conciliation Act, 1996 (the 'A&C Act') seeking termination of the mandate of the erstwhile Arbitral Tribunal and appointment of an independent substitute arbitrator; with a further direction to the substitute arbitrator to decide the entire claim of the petitioner.

2. The disputes between the parties have arisen in the context of a tender awarded to the petitioner by the respondent for work of *"construction of four lane road over bridge (Span 1 x 21600 + 1 x 25080 +1 x 21600) in lieu of level crossing No. 7-B at K.M. 829.070 on Lucknow - Zafrabad Section near Jaunpur with open foundation and composite grinder and erection of girders by launching method"*. The said work was awarded to the petitioner

vide letter of acceptance dated 02.07.2015.

3. Admittedly, Clause 64 of the applicable General Conditions of Contract (GCC) incorporates the arbitration agreement between the parties.

4. The petitioner *vide* letter dated 06.07.2017 raised its claim before the General Manager/Northern Railway. However, the same could not be settled; *vide* letter dated 16.11.2017 the respondent requested petitioner to submit its claim as per Annexure XII of the GCC so that Arbitral Tribunal/arbitrators can be appointed. Pursuant thereto the petitioner *vide* letter dated 29.11.2017 invoked the aforesaid arbitration clause seeking appointment of an independent sole arbitrator and expressly stating that it has not waived the right under Section 12(5) of the A&C Act. The claims that were sought to be referred are as under:

> "*Brief of claim:*
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> *Claim 1 – Refund of Earnest Money, forfeited (Demand Draft No.782074 dated 24/04/2015) – Rs.7,63,200.00*
>
> *Claim 2 – Refund of sum encashed under Bank Guarantee No.2560BG-329-15 dated 24/07/2015 (Amendment – 1 dated 25/08/2015) – Rs.60,08,720.00*
>
> *Claim 3 – On site and off site expenditure Rs.56,25,476.00*
>
> *Claim 4 – Loss of profit (10% of unfinished value of work) Rs.1,20,17,438.75*
>
> *Total: Rs.2,44,14,834.75*
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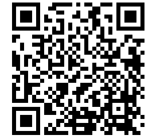
> *Claim 5 – 18% interest on the above sum from the date of submission of this document till realisation.*
>
> *Claim 6 - Any other claim admissible under the contract and/or law.*"



5. The respondent *vide* letter dated 05.06.2018 constituted an Arbitral Tribunal and referred only 2 claims out of 6 claims of the petitioner for arbitration. The details of the claims that were referred to arbitration are as under:

"***Contractor's claims:-***

Claim No.	*Description of claims*	*Amount (Rs.)*
1	*Refund of Earnest money deposited in the shape of Demand Draft No.782074 dated 24.02.2015*	*7,63,200.00*
2	*Refund of sum encashed under Bank Guarantee No.2560BG-329-15 dated 24.07.2015*	*60,08,720.00*
	Total amount	*67,71,920.00*

Railway's claims

Description of claim	*Amount*
Termination of contract is correct and amount of security deposit and performance guarantee forfeited/encashed by Railways as per clause 5.2(f) of contract agreement is in order and as such amount available with Railways is not refundable. Extract of clause 5.2(f) is reproduced below :- *Extract of clause 5.2(f)* *"Whenever the contract is rescinded, the security shall be forfeited and the Performance Guarantee shall be encashed and the balance work shall be got done independently without Risk and Cost of the failed contractor."*	

6. The petitioner sent a letter dated 27.06.2018 to the respondent raising objection/s against deletion of its four claims and called upon the respondent to include the same in the claims referred to arbitration. However the same was not done by the respondent.

7. As per the respondent, claim nos. 3 to 6 are covered under excepted

matters and thus not referable to arbitration, as per the contract provisions and the applicable GCC.

8. The petitioner protested before the Arbitral Tribunal regarding non-inclusion of all its claims. The petitioner also filed an application under Section 12 (3) read with 13 (2) of the A&C Act raising doubts as to neutrality and impartiality of the Arbitral Tribunal, however, the said application was rejected by the Arbitral Tribunal *vide* order dated 28.07.2018. Thereafter, the petitioner also filed a petition under Section 14 of the A&C Act before this Court seeking termination of the mandate of the arbitrators appointed by the respondent, *inter alia,* on the ground that the arbitrators are former employees of the Railways, therefore ineligible for being appointed as arbitrators. This court *vide* order dated 31.08.2018 rejected this contention; the contention that the arbitrators are biased was left open to be taken by the petitioner under Section 34 of the A&C Act, if so advised.

9. Certain proceedings have subsequently taken place before the Arbitral Tribunal, however the petitioner is stated to have not participated in them. Ultimately, the time period provided under Section 29A of the A&C Act to complete the arbitral proceedings came to an end. No application seeking extension of time was filed by either of the parties.

10. In respect to the same arbitration, the respondent sent a letter dated 14.02.2022 to the petitioner requesting the petitioner to fill up the format of Annexure XV of modified GCC containing Agreement towards waiver under Section 12 (5) and 31A (5) of the A&C Act for reconstitution of the Arbitral Tribunal. The respondent has further sent letters dated 23.03.2022, 25.05.2022 and 21.06.2022 to the petitioner, wherein the petitioner was

requested to select two names out of a panel of four names contained in the said letters so that the General Manager may nominate one of them to act as the arbitrator. Thereafter, the petitioner has filed the present petition.

11. The present petition is opposed by learned counsel for the respondent on the ground that the appointment procedure as prescribed in clause 64 of the GCC is a valid procedure as held by the Supreme Court in ***Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV)***[1]. It is submitted that the respondent has the power to re-constitute Arbitral Tribunal as per clause 64(3)(a)(iii) of the GCC-2014. It is submitted that the petitioner shall select two persons from the panel of four names sent to the petitioner, from which one person shall then be appointed as the arbitrator. It is submitted that although the correctness of ***Central Organisation*** (supra) has been doubted by Coordinate Benches of the Supreme Court in ***Union of India v. Tantia Constructions Limited***[2] and ***JSW Steel v. South Western Railway***[3], there is no stay on the said judgement. It is further submitted that as per clause 63 of GCC, General Manager of the respondent has the power to notify claims to be arbitrated upon and the additional claims of the petitioner cannot be referred to arbitration.

12. I have heard learned counsel for the parties. I find no merit in the objection raised by the respondent.

13. It is common case of the parties that the mandate of the previous Arbitral Tribunal stands terminated and hence, a substitute arbitrator needs to be appointed. The respondent has sent three letters to the petitioner seeking reconstitution of the Arbitral Tribunal. *Vide* the said letters, a panel

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[1](2020) 14 SCC 712
[2]SLP (C) No. 12670/2020 vide order dated 11.01.2021
[3]SLP (C) No. 9462/2022

of four retied officers of the respondent has been given to the petitioner, with a request to the petitioner to select any two names out of the panel so that the respondent may nominate one out of them to act as the sole arbitrator. The said panel offered to the petitioner, does not meet the requirements as set out in the judgment of the Supreme Court in ***Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd***., (2017) 4 SCC 665. In ***Voestalpine*** (supra)***,*** it has been, *inter alia,* held as under:

> *"28. Before we part with, we deem it necessary to make certain comments on the procedure contained in the arbitration agreement for constituting the Arbitral Tribunal. Even when there are a number of persons empanelled, discretion is with DMRC to pick five persons therefrom and forward their names to the other side which is to select one of these five persons as its nominee (though in this case, it is now done away with). Not only this, DMRC is also to nominate its arbitrator from the said list. Above all, the two arbitrators have also limited choice of picking upon the third arbitrator from the very same list i.e. from remaining three persons. This procedure has two adverse consequences. In the first place, the choice given to the opposite party is limited as it has to choose one out of the five names that are forwarded by the other side. There is no free choice to nominate a person out of the entire panel prepared by DMRC. Secondly, with the discretion given to DMRC to choose five persons, a room for suspicion is created in the mind of the other side that DMRC may have picked up its own favourites. Such a situation has to be countenanced. We are, therefore, of the opinion that sub-clauses (b) & (c) of Clause 9.2 of SCC need to be deleted and instead choice should be given to the parties to nominate any person from the entire panel of arbitrators. Likewise, the two arbitrators nominated by the parties should be given full freedom to choose the third arbitrator from the whole panel.*
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> *29. Some comments are also needed on Clause 9.2(a) of GCC/SCC, as per which DMRC prepares the panel of "serving or retired engineers of government departments or public sector undertakings". It is not understood as to why the panel has to be limited to the aforesaid category of persons. Keeping in view the spirit of the amended provision and in order to instil confidence in the mind of the other party, it is imperative that panel should be broadbased. Apart from serving or retired engineers of government departments and public sector undertakings, engineers of prominence and high repute from private sector should also be included. Likewise panel should comprise of persons with legal background like*

Judges and lawyers of repute as it is not necessary that all disputes that arise, would be of technical nature. There can be disputes involving purely or substantially legal issues, that too, complicated in nature. Likewise, some disputes may have the dimension of accountancy, etc. Therefore, it would also be appropriate to include persons from this field as well

30. Time has come to send positive signals to the international business community, in order to create healthy arbitration environment and conducive arbitration culture in this country. Further, as highlighted by the Law Commission also in its report, duty becomes more onerous in government contracts, where one of the parties to the dispute is the Government or public sector undertaking itself and the authority to appoint the arbitrator rests with it. In the instant case also, though choice is given by DMRC to the opposite party but it is limited to choose an arbitrator from the panel prepared by DMRC. It, therefore, becomes imperative to have a much broadbased panel, so that there is no misapprehension that principle of impartiality and independence would be discarded at any stage of the proceedings, specially at the stage of constitution of the Arbitral Tribunal. We, therefore, direct that DMRC shall prepare a broadbased panel on the aforesaid lines, within a period of two months from today."

14. In the present case, the panel of four retired Railway Officers afforded to the petitioner by the respondent is manifestly not broad-based. The same therefore, impinges upon the validity of the appointment procedure prescribed in Clause 64 of the GCC.

15. The judgment of the ***Central Organisation*** (supra), relied upon the by respondent is clearly distinguishable for the reasons noted in the judgment of this court in ***Margo Networks (P) Ltd. v. Railtel Corpn. of India Ltd.***[4], In ***Margo Networks*** (supra) it has been held that ***Central Organisation*** (supra), does not in any manner overrule ***Voestalpine*** (supra). It was *inter alia* held as under*:*

"25. Thus, it was held by the Supreme Court in Voestalpine (supra) that:

i. Affording a panel of five names to the petitioner from which the petitioner was required to nominate its nominee arbitrator, was restrictive in nature; the same created room for suspicion that DMRC

[4]2023 SCC OnLine Del 3906.

may have picked up its own favourite;
ii. Choice should be given to the concerned party to nominate any person from the entire panel of arbitrators;
iii. The two arbitrators nominated by the parties should be given full freedom to choose the third arbitrator;
iv. The panel ought not to be restricted/limited to retired engineers and/or retired employees but should be broad based and apart from serving or retired employees of government departments and public sector undertakings, the panel should include lawyers, judges, engineers of prominence from the private sector etc.

26. CORE does not in any manner overrule Voestalpine (supra) or narrow down the scope thereof, although it does not deal specifically with the issue as to whether the panel afforded by the Railways in that case was in conformance with the principles laid down in Voestalpine (supra).

27. The difficulties which were found to have inflicted the panel afforded to the petitioner in Voestalpine (supra) also squarely apply to the present case.

28. In the present case, the respondent has shared a panel of ten arbitrators with the petitioner, all being ex-employees of the Railways/RailTel. Apart from the ex-employees of the railways, no other person has been included in the panel. Such a panel is clearly restrictive and is manifestly not "broadbased" and therefore, impinges upon the validity of the appointment procedure prescribed in clause 3.37 of the RFP."

16. In ***Margo Networks*** (supra), the court also noticed that the principle laid down in ***Voestalpine*** (supra) has been followed in a large number of cases, namely in ***SMS Ltd.* v. *Rail Vikas Nigam Limited***[5], ***Simplex Infrastructures Ltd. v. Rail Vikas Nigam Limited***[6], ***Overnite Express Limited v. Delhi Metro Rail Corporation***[7], ***BVSR-KVR (Joint Ventures) v. Rail Vikas Nigam Ltd.***[8], ***Consortium of Autometers Alliance Ltd. and Canny Elevators Co. Ltd. v. Chief Electrical Engineer/Planning,***

[5]2020 SCC OnLine Del 77
[6]2018 SCC OnLine Del 13122
[7]2022 : DHC : 3144
[8]2020 SCC OnLine Del 456

Delhi Metro Rail Corporation[9], ***Gangotri Enterprises Ltd. v. General Manager Northern Railways***[10] and ***L&T Hydrocarbon Engineering Limited v. Indian Oil Corporation Limited***[11].

17. In ***Gangotri Enterprises*** (supra) in the context of an identical procedure for appointment, this court has held as under:

> *"31. In the present cases, it is seen that the panel of arbitrators as sent by the respondent contained only four names, which cannot be considered to be broad based by any extent of imagination. Thus, the said panel as given by the respondent does not satisfy the concept of neutrality of arbitrators as held by Supreme Court in the case of Voestalpine Schienen GMBH (supra). Further, as already noted, Supreme Court has already given a prima facie view with respect to correctness of the judgment in the case of Central Organisation for Railway Electrification (supra), wherein a similar clause was considered and has passed reference order for constituting a larger Bench to look into the correctness of the said judgment. In view thereof, it is held that the petitioner herein was within its right to nominate its Arbitrator."*

18. In the circumstances, the procedure sought to be adopted by the respondents for the appointment of a sole arbitrator for the purpose of re-constituting the arbitral tribunal, is not in accordance with law. Further, there is no impediment in appointing an independent sole arbitrator to adjudicate the disputes between the parties as contemplated in ***Perkins Eastman Architects DPC v. HSCC (India) Ltd.***[12].

19. There is also no merit in the contention of the respondent that the remaining claims of the petitioner cannot be referred to arbitration. In the present case, the petitioner *vide* letter dated 06.07.2017 has raised its claims before the General Manager of the respondent. Thereafter, as per Clause 63

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[9] 2021 : DHC : 68
[10] 2022 : DHC : 4520
[11] 2020 SCC OnLine Del 77
[12] (2020) 20 SCC 760

of the GCC it was incumbent on the General Manager to make and notify decision on all matters referred to it by the petitioner within a period of 120 days. There is nothing on record to suggest that a decision was rendered by the General Manager as regards any of the claim/s falling under "expected matters". In ***Union of India* v. *J. Sons Engineering Corporation Ltd*.**[13] it has been held as under:

> *"22...There is nothing on record to suggest that the petitioners had considered the respondent's representation and notified the decision in terms of clause 63 of the G.C.C. In the absence of a decision under clause 63, the bar under clause 63 would not apply. In other words, all matters related to the clauses mentioned in clause 63 would be treated as 'excepted matters' if a decision is taken by the Railways. The necessary corollary is the claims made by the respondent cannot be deemed as 'excepted matters'..."*

20. Subsequently, *vide* letter dated 29.11.2017, the petitioner has invoked the arbitration clause and raised six claims on the respondent. The unilateral act of the respondent in excising four of the claims sought to be raised by the petitioner cannot be countenanced. No reasons have been set out in letter dated 05.06.2018 as to why only two of the six claims of the petitioner were referred to arbitration. Once the request to refer a particular claim to arbitration was received by the respondent, the arbitral proceedings in respect to that particular claim is deemed to have commenced under Section 21 of the A&C Act. It is thereafter the prerogative of the Arbitral Tribunal to decide whether the claim made falls within the scope of the arbitration clause and/or falls within the scope of "excepted matter".

21. Accordingly, Ms. Justice (Retd.) Deepa Sharma, Former Judge, Delhi High Court, (Mobile No.-9910384631) is appointed as the Sole Arbitrator to

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[13] 2015 SCC OnLine Del 8765

adjudicate the disputes between the parties.

22. The parties shall be entitled to raise their respective claims/counter claims before the learned sole arbitrator, subject to any objection/s as regards arbitrability/jurisdiction/maintainability, which shall be decided by the arbitrator, in accordance with law.

23. The learned Arbitrator may proceed with the arbitration proceedings subject to furnishing to the parties requisite disclosures as required under Section 12 of the A&C Act.

24. The learned Arbitrator shall be entitled to fee in accordance with Fourth Schedule of the A&C Act; or as may otherwise be agreed to between the parties and the learned Arbitrator.

25. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Arbitrator on their merits, in accordance with law.

26. Nothing in this order shall be construed as an expression of opinion on the merits of the respective contentions/claims of the parties.

27. With the aforesaid directions, the present petition is disposed of.

SACHIN DATTA, J

DECEMBER 20, 2023
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