

Union Of India vs Pradeep Vinod Construction Co. on 14 November, 2019

Equivalent citations: AIR ONLINE 2019 SC 1498, 2020 (2) SCC 464, (2019) 16 SCALE 783, (2019) 265 DLT 104, (2019) 4 CURCC 232, (2019) 6 ARBILR 284, (2020) 1 RECCIVR 208, (2020) 1 WLC(SC)CVL 14

Author: R. Banumathi

Bench: Hrishikesh Roy, A.S. Bopanna, R. Banumathi

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.6400 OF 2016

UNION OF INDIA

...Ap

VERSUS

PRADEEP VINOD CONSTRUCTION
COMPANY

...Respond

With

CIVIL APPEAL NO.6420 OF 2016

UNION OF INDIA

...App

VERSUS

M/S. BM CONSTRUCTION COMPANY

...Respond

JUDGMENT

R. BANUMATHI, J.

These appeals arise out of the impugned judgments dated 15.05.2015 and 02.02.2015 passed by High Court of Delhi in Arbitration Petition No.168 of 2015 and Arbitration Petition No.531 of 2014 in and by which the High Court appointed an independent arbitrator for adjudication of disputes between the parties, instead of directing appointment of arbitrator as per Clause 64 of General Conditions of Contract (GCC) which stipulates that Railways' Officers should be appointed as Arbitrator.

2. Brief facts which led to filing of these appeals are as under:-

Facts in CA No.6400/2016:-

On 14.07.2010, Northern Railways awarded the contract for misc. civil engineering works such as construction of duty huts at L-xings, water supply arrangements, provision of station name boards etc. in connection with Rewari-Rohtak New Line to the respondent. The total cost of the work at accepted rate came to Rs.5,30,31,369.30. The work was finally completed on 31.03.2012. According to the appellant, final payments were made by the appellant to the respondent vide bill bearing Vr.No.00356/104/C/TKJ dated 06.05.2014. On the same day i.e. on 06.05.2014, parties also entered into a supplementary agreement which recorded full accord and satisfaction as on 06.05.2014. In the meanwhile, on 05.05.2014, respondent sent a letter to the appellant alleging that under the compulsion of circumstances, it had to sign the so-called final bill without protest as desired by the administration, otherwise heavy financial loss would have been caused to respondent and it may not be in a position to tender and execute further works. The respondent averred that a sum of over Rs.1.50 crores still remains to be paid to the respondent and calling upon the appellant to make the payment within 90 days. The respondent vide its letter dated 05.05.2014 invoked arbitration clause as contained under Clause 64 of General Conditions of Contract.

3. The appellant issued a reply dated 25.07.2014 rejecting the arbitration claim of the respondent, taking the stand that the respondent had signed the final bill and also signed the supplementary agreement which clearly stipulates that it was agreed between the parties that the respondent has accepted the said sums mentioned therein in full and final satisfaction of all dues and claims under the principal agreement.

4. The respondent thereafter filed Arbitration Petition No.168 of 2015 under Section 11 of the Arbitration and Conciliation Act, 1996 before the High Court for appointment of an arbitrator. Upon consideration of contention of the parties, the learned Single Judge held that the question whether the discharge certificate and supplementary agreement were signed by the respondent under duress, would require evidence to be led and is therefore, required to be examined by the arbitrator. So far as the appointment of arbitrator is concerned, the High Court held that since the Railways failed to appoint an arbitrator despite invocation of the arbitration clause by the respondent on 05.05.2014, the Railways forfeited its right under the arbitration clause and the learned Judge appointed Mr. Ram Prakash(Retd.), District and Sessions Judge as the sole arbitrator instead of directing the appointment of arbitrator as per Clause 64 of the General Conditions of Contract. Facts in CA No.6420/2016:-

5. An agreement dated 17.01.2012 was entered into between the Northern Railways and the respondent for construction of two lane road over bridge in lieu of L-xing near Muradnagar Railway Station at a cost of Rs.4,21,69,176.25/-. The work was completed on 03.08.2013. According to the Railways, the respondent received full and final payment vide final bill bearing Vr.No.280 dated 29.01.2014 and also signed a supplementary agreement dated 01.03.2014 acknowledging full and final settlement of all claims. It was also provided in this supplementary agreement that the

principal agreement shall stand finally discharged and the arbitration clause contained therein shall cease to exist. The respondent vide letter dated 15.01.2014 raised two claims and requested for appointment of arbitrator. The Railways informed the respondent that the claims of the respondent are not referable to arbitration as the same are covered under “excepted matter”. The respondent-contractor on 28.08.2014 also sent a “No Claim” letter to the Railway stating that it has no claim towards the Railways and requested for release of security deposit made by it.

6. The respondent thereafter filed Arbitration Petition No.531/2014 under Section 11 of the Arbitration and Conciliation Act, 1996 seeking appointment of an arbitrator. The High Court held that though the appellant claims that the disputes raised by the respondent are in the nature of “excepted matters” but that the issue can be examined by the arbitrator. With those findings, the court appointed Mr. H.K. Chaturvedi, advocate as Sole Arbitrator and directed that arbitration shall take place under the aegis of the Delhi International Arbitration Centre.

7. Mr. Bharat Singh, learned counsel appearing for the appellant- Union of India-Railways submitted that the request for appointment of arbitrator was made before the Amendment Act, 2015 (w.e.f 23.10.2015) and hence, the proceedings will have to be proceeded in accordance with the pre-amended provision of the Act, 1996. It was submitted that the High Court erred in appointing an independent arbitrator instead of directing the General Manager, Railway administration to appoint an arbitrator as per the terms and conditions of Clause 64 of GCC which stipulates that “excepted matters” cannot be referred to arbitration.

8. Per contra, Mr. Shantanu Kumar and Ms. Geetanjali Mohan, learned counsel for the respondent(s) submitted that once the appellant has failed to appoint an arbitrator under the terms of the agreement before the petition under Section 11(6) of the Arbitration Act, 1996 being filed before the Court, the authority forfeits its right of appointing an arbitrator and it is for the Chief Justice/Designate Judge to appoint an independent arbitrator under Section 11(6) of the Act. It was further submitted that Section 11(6) empowers the court to deviate from the terms of the agreement, if required, by appointing an independent arbitrator. Insofar as the contention that the respondent(s) have already received the final bill and issued “No Claim” letter to the Railway, the learned counsel for the respondent(s) submitted that “No Claim” certificate was issued under compulsion and it is nothing but due to undue influence by the authorities and it is open to the arbitrator to adjudicate by examining the bills which is furnished for payment and in such circumstances, it cannot be said to be an “excepted matter”.

9. We have heard the learned counsel appearing for the parties. We have carefully considered the contentions of both the parties and perused the impugned judgment and materials on record.

10. The respondent(s) are registered contractors with the Railways and they are claiming certain payments on account of the work entrusted to them. The request of the respondent(s) for appointment of arbitrator invoking Clause 64 of the contract was declined by the Railways stating that their claims have been settled and the respondent(s) have issued “No Claim” certificate and executed supplementary agreement recording “accord and satisfaction” and hence, the matter is not referable to arbitration. Admittedly, the request for referring the dispute was made much prior to

the Amendment Act, 2015 which came into force w.e.f. 23.10.2015. Since the request for appointment of arbitrator was made much prior to the Amendment Act, 2015 (w.e.f. 23.10.2015), the provision of the Amended Act, 2015 shall not apply to the arbitral proceedings in terms of Section 21 of the Act unless the parties otherwise agree. As rightly pointed out by the learned counsel for the appellant, the request by the respondent(s)- contractors is to be examined in accordance with the Principal Act, 1996 without taking resort to the Amendment Act, 2015.

11. Insofar as the applicability of the provisions of the Principal Unamended Act, 1996, after referring to *SP Singla Pvt. Ltd. v. State of Himachal Pradesh* and another (2019) 2 SCC 488, in *Union of India v. Parmar Construction Company* 2019 (5) SCALE 453, it was held as under:-

“26. We are also of the view that the Amendment Act, 2015 which came into force, i.e. on 23rd October, 2015, shall not apply to the arbitral proceedings which has commenced in accordance with the provisions of Section 21 of the Principal Act, 1996 before the coming into force of Amendment Act, 2015, unless the parties otherwise agree.

27. In the instant case, the request was made and received by the Appellants in the concerned appeal much before the Amendment Act, 2015 came into force. Whether the application was pending for appointment of an arbitrator or in the case of rejection because of no claim as in the instant case for appointment of an arbitrator including change/substitution of arbitrator, would not be of any legal effect for invoking the provisions of Amendment Act, 2015, in terms of Section 21 of the principal Act, 1996. In our considered view, the applications/requests made by the Respondent contractors deserves to be examined in accordance with the principal Act, 1996 without taking resort to the Amendment Act, 2015 which came into force from 23rd October, 2015.”

12. In order to appreciate the contention of the parties, it is necessary to refer to Clause 64 of the General Conditions of Contract (GCC) which 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. (1) (ii) The demand for arbitration shall specify the matters which are in question, or subject of the dispute or difference as also the amount of claim item-wise. Only such dispute(s) or difference(s) in respect of which the demand has been made, together with counter claims or set off, given by the Railway, shall be referred to arbitration and other matters shall not be included in the reference.

.....

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. {Authority: Railway Board's letter No. 2012/CE-I/CT/ARB./24, Dated 22.10./05.11.2013}

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.

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.”

13. It is seen from the above that under Clause 64(1) of GCC, if there is any dispute or differences between the parties or the respective rights and liabilities of the parties on any matter in question or any other ancillary dispute arising from the terms of the contract or if the railway administration fails to make a decision within the time stipulated thereon, then in any such case, but except in any of the “excepted matters”, the General Manager may nominate the officer by designation as referred to under Clause 64(3)(a)(i) and a(ii) respectively with further procedure being prescribed for the sole arbitrator or the Arbitral Tribunal to adjudicate the dispute/differences arising under the terms of the contract between the parties.

14. In *Union of India and another v. M.P. Gupta* (2004) 10 SCC 504, *Union of India and another v. V.S. Engineering (P) Ltd.* (2006) 13 SCC 240, *Union of India v. Singh Builders Syndicate* (2009) 4 SCC 523 and in a catena of judgments, the court held that whenever the agreement specifically provides for appointment of named arbitrators, the appointment of arbitrator should be in terms of the contract. After referring to *M.P. Gupta*, in *V.S. Engineering*, it was held as under:-

“3. The learned Additional Solicitor General appearing for the appellant Union of India has pointed out that as per clauses 63 and 64 of the General Conditions of Contract, this Court in no uncertain terms has held that the Arbitral Tribunal has to be constituted as per the General Conditions of Contract, the High Court should not interfere under Section 11 of the Act and the High Court should accept the Arbitral Tribunal appointed by the General Manager, Railways. In this connection, the learned ASG invited our attention to a decision of this Court directly bearing on the subject in *Union of India v. M.P. Gupta* (2004) 10 SCC 504 wherein a similar question with regard to appointment of the Arbitral Tribunal for the Railways with reference to clause 64 of the General Conditions of Contract came up before this Court and this Court held that where two gazetted railway officers are appointed as the Arbitral Tribunal, the High Court should not appoint a retired Judge of the High Court as a sole arbitrator and the appointment of sole arbitrator was set aside. The conditions of clauses 63 and 64 of the General Conditions of Contract are almost analogous to the one we have in our hand. In that case also relying on clause 64 of the contract a three-Judge Bench presided over by the Chief Justice of India observed as follows: (SCC p.

505, para 4) “4. In view of the express provision contained therein that two gazetted railway officers shall be appointed as arbitrators, Justice P.K. Bahri could not be appointed by the High Court as the sole arbitrator. On this short ground alone, the judgment and order under challenge to the extent it appoints Justice P.K. Bahri as sole arbitrator is set aside. Within 30 days from today, the appellants herein shall appoint two gazetted railway officers as arbitrators. The two newly appointed arbitrators shall enter into reference within a period of another one month and thereafter the arbitrators shall make their award within a period of three months.”” The court, however observed in para (6) that in the case of public institutions which are slow in responding to the request made by the contractor for appointment of an arbitrator, the power of the High Court to appoint an arbitrator under Section 11 is not taken away. The failure of the authorities in appointing an arbitrator and when the contractor approached the court for appointment of an arbitrator under

Section 11 of the Act, it will then be in the discretion of the Chief Justice/designated Judge to appoint a railway officer as per the contract or a High Court Judge.

15. Considering the various matters of railway contracts and setting aside the appointment of independent arbitrators, after referring to M.P. Gupta and V.S. Engineering and other judgments, in Parmar Construction Company, this Court set aside the appointment of the independent arbitrator and directed the General Manager of the Railways to appoint arbitrator in terms of Clause 64(3) of the agreement. In paras (44) and (45), this Court held as under:-

“44. To conclude, in our considered view, the High Court was not justified in appointing an independent arbitrator without resorting to the procedure for appointment of an arbitrator which has been prescribed under Clause 64(3) of the contract under the inbuilt mechanism as agreed by the parties.

45. Consequently, the orders passed by the High Court are quashed and set aside. The Appellants are directed to appoint the arbitrator in terms of Clause 64(3) of the agreement within a period of one month from today under intimation to each of the Respondents/contractors and since sufficient time has been consumed, at the first stage itself, in the appointment of an arbitrator and majority of the Respondents being the petty contractors, the statement of claim be furnished by each of the Respondents within four weeks thereafter and the arbitrator may decide the claim after affording opportunity of hearing to the parties expeditiously without being influenced/inhibited by the observations made independently in accordance with law.” The ratio of the above decision squarely applies to the case in hand. When the agreement specifically provides for appointment of named arbitrators, the appointment should be in terms of the agreement. The High Court, in our view, was not right in appointing an independent arbitrator ignoring Clause 64 of the General Conditions of Contract.

16. Insofar as the plea of the appellant that there was settlement of final bill/issuance of “No Claim” letter, the learned counsel for the appellant has drawn our attention on Clause 43(2) – Signing of the “No Claim” Certificate and submitted that as per Clause 43(2), the contractor signs a “No Claim” certificate in favour of the railway in the prescribed format after the work is finally measured up and the contractor shall be debarred from disputing the correctness of the items covered under the “No Claim” certificate or demanding a clearance to arbitration in respect thereof. On behalf of the respondent, it has been seriously disputed that issuance of “No Claim” certificate as to the supplementary agreement recording accord and satisfaction as on 06.05.2014 (CA No.6400/2016) and issuance of “No Claim” certificate on 28.08.2014 (CA No.6420/2016) that they were issued under compulsion and due to undue influence by the railway authorities. We are not inclined to go into the merits of the contention of the parties. It is for the arbitrator to consider the claim of the respondent(s) and the stand of the appellant-railways. This contention raised by the parties are left open to be raised before the arbitrator.

17. In the result, the impugned judgments dated 15.05.2015 and 02.02.2015 of the High Court of Delhi in Arbitration Petition No.168 of 2015 and Arbitration Petition No.531 of 2014 are set aside and these appeals are allowed. The appellant is directed to appoint the arbitrator in terms of Clause 64(3) of the agreement within a period of one month from today under intimation to the respondent(s)- contractors. As soon as the communication of the appointment of arbitrator is made to the respondent(s), the statement of claim be filed by the respondent(s) within six weeks thereafter and the reply of the appellant to be filed within four weeks thereafter. The arbitrator shall proceed with the matter in accordance with law and decide the claim after affording sufficient opportunity of hearing to both parties expeditiously preferably within a period of four months.

.....J. [R. BANUMATHI]J. [A.S. BOPANNA]J.
[HRISHIKESH ROY] New Delhi;

November 14, 2019