

Savronik Sistem India Private Limited vs Northern Railways & Anr on 23 March, 2023

Author: Yashwant Varma

Bench: Yashwant Varma

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* IN THE HIGH COURT OF DELHI AT NEW DELHI

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+ ARB.P. 709/2022

SAVRONIK SISTEM INDIA PRIVATE LIMITED

..... Petitioner

Through: Mr. Satvik Varma, Sr. Adv.
with Mr. Tushar Mudil, Mr.
Manoj Kumar & Ms. Sukhmani
Kaur, Advs.

versus

NORTHERN RAILWAYS & ANR. Respondents

Through: Mr. Subhash Tanwar, CGSC,
and Mr. Sandeep Mishra, Adv.

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+ ARB.P. 712/2022

SAVRONIK SISTEM INDIA PRIVATE LIMITED

..... Petitioner

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NORTHERN RAILWAYS & ANR. Respondents

Through: Mr. Subhash Tanwar, CGSC,
and Mr. Sandeep Mishra, Adv.
for UOI

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

ORDER

% 23.03.2023

1. With the consent of parties these two petitions preferred under Section 11 of the Arbitration and Conciliation Act, 1996 are proposed to be disposed of in terms of the present common order. The the Act By:NEHA Signing Date:29.03.2023 20:01:05 instant petitions arise out of disputes emanating from Contract Nos. 942 and 1016 and the failure of parties to concur on the constitution of an Arbitral Tribunal. For the sake of brevity the Court proposes to notice the following essential facts as forming part of ARB.P. 709/2022.

2. The respondent IRCON International Limited is stated to have floated a tender in April 2014 for execution of works described as "Comprehensive Operation and Maintenance Work of 11 KV, Ventilation, Electro Mechanical (E&M), Telecontrol [SCADA] and Telecom System for PIL PANJAL Tunnel T-80 on Dharam-Qazigund Section of USBRL Project (J&K)(Package- T-80,COMC)". According to the petitioner, the work assigned under both the contracts had been completed well within time and the respondent had also acknowledged the same in terms of its internal communication dated 28 June 2017 purporting to record a satisfactory completion of work on 14 September 2016 and for consequential release of Bank Guarantees which had been held.

3. From the record it would appear that sometime in the month of September 2017 an FIR came to be registered with Police Station CBI Srinagar against the Directors of the petitioner and certain other railway officials of having overcharged under different heads in the course of execution of those contracts. The respondent, consequent to the said criminal case coming to be registered are stated to have withheld payments, Completion Certificates and Defect Liability Certificates.

4. By a letter of 05 October 2017, the petitioner demanded various sums in terms of the final bill dated 15 September 2016 as well as the release of amounts held under the head of Retention Money. Since the disputes in respect of the aforesaid issues could not be resolved, the petitioner served a notice dated 08 April 2021 invoking arbitration.

The petitioner, as would be evident from a reading of the aforesaid communication, also appears to have raised a challenge to the constitution of the Arbitral Tribunal in terms of Clause 64 of the General Conditions of Contract² and in terms of which a Tribunal was to comprise of either three gazetted railway officers or two railway gazetted officers and one retired railway officer.

5. Responding to the aforesaid notice, the petitioner vide a letter dated 29 October 2021 was called upon to choose a name out of a panel of four retired railway officers suggested by the respondent. The petitioner in terms of its reply of 24 November 2021 disputed the eligibility and raised a doubt with respect to the impartiality and independence of the arbitrators proposed.

6. By the same communication, petitioners proceeded to nominate an arbitrator on its behalf and further called upon the respondents to communicate their nomination within 15 days from the date of receipt of this notice . The aforesaid action was declined by the respondent who reiterated that the panel would have to be constituted in terms of the GCC.

7. It becomes pertinent to note that the respondent in terms of its letter of 30 December 2021 again referred to Clause 64(3)(a)(ii) of the GCC and reiterated its insistence of the Arbitral Tribunal comprising of three gazetted railway officers. It was further asserted that the procedure of nomination suggested by the petitioner would clearly be violative of the arbitration agreement and therefore the request of the petitioner made in that regard cannot be acceded to. It is in the aforesaid backdrop that the instant petition under Section 11 came to be instituted.

8. Before proceeding further, it would be apposite to extract Clause 64 insofar as it deals with the appointment and constitution of GCC By:NEHA Signing Date:29.03.2023 20:01:05 the Arbitral

Tribunal.

"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 22.102/05.11.2013}

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.(3) (a)(iii) If one or more of the arbitrators appointed as above refuses to act as arbitrator, withdraws from his office as arbitrator, or vacates his/their office/offices or is/are unable or unwilling to perform his functions as arbitrator for any reason whatsoever or dies or in the opinion of the General Manager fails to act without undue delay, the General Manager shall appoint new arbitrator/arbitrators to act in his/their place in the same manner in which the earlier arbitrator/arbitrators had been appointed. Such re-constituted Tribunal may, at its discretion, proceed with the reference from the stage at which it was left by the previous arbitrator (s).

64.(3) (a)(iv) The Arbitral Tribunal shall have power to call for such evidence by way of affidavits or otherwise as the Arbitral Tribunal shall think proper, and it shall be the duty of the parties hereto to do or cause to be done all such things as may be necessary to enable the Arbitral Tribunal to make the award without any delay. The Arbitral Tribunal should record day to-day proceedings. The

proceedings shall normally be conducted on the basis of documents and written statements.

64.(3) (a)(v) While appointing arbitrator(s) under Sub-Clause (i),

(ii) & (iii) above, due care shall be taken that he/they is/are not the one/those who had an opportunity to deal with the matters to which the contract relates or who in the course of his/their duties as Railway servant(s) expressed views on all or any of the matters under dispute or differences. The proceedings of the Arbitral Tribunal or the award made by such Tribunal will, however, not be invalid merely for the reason that one or more arbitrator had, in the course of his service, opportunity to deal with the matters to which the contract relates or who in the course of his/their duties expressed views on all or any of the matters under dispute.

64.(3) (b)(i) The arbitral award shall state item wise, the sum and reasons upon which it is based. The analysis and reasons shall be detailed enough so that the award could be inferred therefrom.

64.(3) (b)(ii) A party may apply for corrections of any computational errors, any typographical or clerical errors or any other error of similar nature occurring in the award of a Tribunal and interpretation of a specific point of award to Tribunal within 60 days of receipt of the award.

64.(3) (b)(iii) A party may apply to Tribunal within 60 days of receipt of award to make an additional award as to claims presented in the arbitral proceedings but omitted from the arbitral award."

9. It is the case of the respondent and one which is also set out in the reply that the appointment procedure must abide by Clause 64(3)(a)(ii) and the demand of the petitioner for appointment of persons outside the panel would clearly run contrary to the agreed procedure. It was also contended by the learned counsel appearing for the respondent that the validity of the appointment procedure, that is, appointment of retired railway officers as independent arbitrators has already been considered and upheld by the Supreme Court as would be evident from the conclusions drawn and recorded in Central Organisation for Railway Electrification v. ECI-SPIC-SMO-

MCML (JV)3.

10. Mr. Varma, learned senior counsel appearing for the petitioner however submitted that Central Organisation was dealing with Clause 64(3)(b) of the amended GCC and which clause had come to be altered pursuant to the amendments introduced in the Act by virtue of Act 3 of 2016 and more particularly to give effect to the introduction of Section 12(5) read with the Sixth and Seventh Schedules of the Act. Mr. Varma submitted that undisputedly the appointment of a gazetted railway officer would clearly be in violation of the prohibitions and disqualifications which stand enumerated in the Seventh Schedule and thus the appointment procedure as prescribed and envisaged under Clause 64(3)(a)(ii) is clearly unworkable. Learned senior counsel also submitted that the petitioner had also not waived off the applicability of sub-section (5) of Section 12 and consequently the unyielding stand taken on behalf of the respondent for the Tribunal to consist of gazetted officers is wholly untenable.

11. It would be apposite to note that clause 64(3)(a)(ii) stipulates that the Arbitral Tribunal shall comprise of either a panel of three gazetted railway officers or two gazetted railway officers along with one retired railway employee who retired as such from a position not lower than that of a Senior Administrative Grade. It further stipulates that for the purposes of constitution of the Arbitral Tribunal, the names of three gazetted railway officers would be forwarded to the contractor within 60 days from the receipt of a written and valid demand for arbitration. In terms of the said clause the contractor is asked to suggest at least two names to the General Manager and who in turn is thereafter empowered to appoint at least one out of them as the contractor's nominee. The General Manager is also obliged to simultaneously appoint the balance number of arbitrators either from (2020) 14 SCC 712 By:NEHA Signing Date:29.03.2023 20:01:05 the same panel or falling outside it and also duly including the name of the presiding arbitrator.

12. Contrary to Clause 64(3)(a)(ii), Clause 64(3)(b) which arose for consideration in Central Organisation reads as follows:-

"64.(3)(b) Appointment of arbitrator where applicability of Section 12(5) of the A&C Act has not been waived off The Arbitral Tribunal shall consist of a panel of three retired railway officers retired not below the rank of SAO officer, as the arbitrator. For this purpose, the Railways will send a panel of at least four names of retired railway officer(s) empanelled to work as railway arbitrator indicating their retirement date to the contractor within 60 days from the day when a written and valid demand for arbitrators is received by the GM.

Contractor will be asked to suggest to General Manager at least two names out of the panel for appointment as contractor's nominee within 30 days from the date of dispatch of the request by the Railways. 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 three arbitrators so appointed. The GM shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contract's nominees. While nominating the arbitrators, it will be necessary to ensure that one of them has served in the Accounts Department."

13. The appointment procedure as contemplated in Clause 64(3)(b) was ultimately upheld by with the Supreme Court holding as follows:-

"37. Clause 64(3)(b) of GCC deals with appointment of arbitrator where applicability of Section 12(5) of the Act has not been waived off. In terms of Clause 64(3)(b) of GCC, the Arbitral Tribunal shall consist of a panel of three retired railway officers retired not below the rank of Senior Administrative Grade Officers as the arbitrators. For this purpose, the Railways will send a panel of at least four names of retired railway officers empanelled to work as arbitrators indicating their retirement date to the contractor within sixty days from the date when a written and valid demand for

arbitration is received by the General Manager. The contractor will be asked to suggest the General Manager at least two names out of the panel for appointment of contractor's nominees within thirty days from the date of dispatch of the request of the Railways. The General Manager shall appoint at least one out of them as the contractor's nominee and panel or from outside the panel, duly indicating the "presiding officer" from amongst the three arbitrators. The exercise of appointing the Arbitral Tribunal shall be completed within thirty days from the receipt of names of contractor's nominees. Thus, the right of the General Manager in formation of the Arbitral Tribunal is counterbalanced by the respondent's power to choose any two from out of the four names and the General Manager shall appoint at least one out of them as the contractor's nominee."

14. It must at this stage itself be noted that admittedly it is the unamended Clause 64(3)(a)(ii) which applies to the present case and not Clause 64(3)(b). As would be manifest from a reading of the aforesaid clause while it mandates the constitution of a Tribunal to comprise of three gazetted railway officers or in the alternative of two serving and one retired railway officer, the ultimate constitution of the Tribunal itself is left principally in the hands of the General Manager. The appointment of serving railway officers would undisputedly fall foul of the disqualifications which now stand prescribed and embodied under the Act. The procedure as prescribed under Clause 64(3)(a)(ii) contemplates a limited and restrictive appointment procedure by empowering the General Manager alone to select, appoint and nominate the arbitrators. Such a procedure would clearly be contrary to the principles of impartiality and independence which must permeate the constitution process itself and which aspect were highlighted by the Supreme Court in Perkins Eastman Architects DPC v. HSCC (India) Ltd.⁴ as well as in Voestalpine Schienen GmbH v. DMRC⁵.

15. The Court notes that in a recent decision rendered by it in BSC Projects Private Limited v. Ircon International Limited,⁶ the Court while examining an identical appointment provision, had held as follows:-

(2020) 20 SCC 760 (2017) 4 SCC 665 By:NEHA Signing Date:29.03.2023 20:01:05

"7. That takes the Court then to the question of the proceedings liable to be initiated for the purposes of constitution of the Arbitral Tribunal itself. As per Clause 73.4(a)(ii), the employer is to forward a panel of more than three names to the contractor within sixty days from the day when a written and valid demand for arbitration is received. From the panel which is so provided, the contractor is required to suggest to the Chairman and Managing Director at least two names. The Chairman and Managing Director, thereafter, is empowered to appoint a nominee arbitrator from at least one out of the names as suggested. That Arbitrator would be recognised as the contractor's nominee.

8. Quite apart from the fact that the respondent has abjectly failed to act in terms of the aforesaid clause since no panel had been provided for the consideration of the petitioner, the Court observes that Clause 73.4(a)(ii) clearly does not appear to leave any element of choice in the hands of the contractor. It is ultimately for the Chairman

and Managing Director to make that nomination. It is in the aforesaid context that the validity of the arbitration and appointment process itself is assailed by Mr. Narula.

9. According to Mr. Narula, while construing the very same clause, the Court in M/S CMM Infraprojects LTD. vs. Ircon International LTD., [2021 SCC OnLine Del 5656] has made the following pertinent observations: -

"40. In CORE (supra), Clause 64 of the GCC which dealt with the procedure of resolution of disputes and provided for demand for arbitration, underwent a change, subsequent to the coming into force of the Arbitration and Conciliation (Amendment) Act, 2015. The Ministry of Railways made a modification to Clause 64 of the GCC, and the Railway Board issued a notification to that effect. The modified clauses which were applicable to the facts of the said case on account of the value of the work contract being more than Rs. 1 Crore, were Clauses 64(b)(a)(ii) and 64(3)(b) of the GCC. As noted above, the former pertained to situations wherein the applicability of Section 12(5) was waived off and the latter pertained to situations where there was no waiver.

41. On considering the afore-noted clauses, the Supreme Court observed that since after coming into force of the Amendment Act of 2015, Clause 64 of GCC had been modified, the High Court was not justified in appointing an independent Sole Arbitrator. Accordingly, the parties were relegated to the procedure of appointment under Clause 64(3)(b) of the GCC, which was found to be a valid clause. The crux of the Supreme Court's reasoning is that ".....Since the respondent has been given the power to select two names from out of the four names of the panel, the power of the appellant nominating its arbitrator gets counter- balanced by the power of choice given to the respondent. Thus, the power of the General Manager to nominate the By:NEHA Signing Date:29.03.2023 20:01:05 arbitrator is counter-balanced by the power of the respondent to select any of the two nominees from out of the four names suggested from the panel of the retired officers. In view of the modified Clauses 64(3)(a)(ii) and 64(3)(b) of GCC, it cannot therefore be said that the General Manager has become ineligible to act as the arbitrator."

42. In contrast, in the instant case the relevant arbitration clause has not been modified. Thus, if we were to do a conjoint reading of Clauses 73.4(a)(ii) and 73.4(a)(vi), it is manifest that the arbitration clause contemplates appointment of serving officials of the Respondent as arbitrators. The clause therefore as worded currently, runs foul with Section 12(5) and Schedule VII of the Act. Thus, CORE (supra) is distinguishable on facts and is not applicable.

43. The other anomaly which merits consideration is that the Managing Director of the Respondent, who has a direct interest in the outcome of the case, is directly appointing 2/3rd of the members of the Arbitral Tribunal and also plays a role in the appointment of the 3rd arbitrator i.e., the contractor's nominee. This is against the spirit of the judgment in Perkins Eastman (supra). This

argument was perhaps not raised in CORE (supra)."

10. The Court finds from a reading of the decision in CMM Infraprojects that the learned Judge has for reasons recorded ultimately found that Clause 73.4(a)(ii) stands on a completely distinct and different footing from the clause which had fallen for consideration before the Supreme Court in Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV), [(2020) 14 SCC 712]. Central Organisation for Railway Electrification had upheld the appointment process since the contractor in terms of the arbitration agreement did have the requisite right to make a choice out of a broad-based panel. While it may be only observed that Perkins was cited for the consideration of the Bench which had decided Central Organisation for Railway Electrification [and which appears to have escaped the attention of the Court while rendering judgment on CMM Infraproject], the Supreme Court had on an ultimate analysis found that the arbitration clause was not only distinct from the one which had been disapproved, it had on an ultimate analysis found that the choice conferred on parties was sufficient to uphold the appointment process. That clearly does not appear to be the position which obtains here when one bears in mind that it is the Chairman and Managing Director who was to ultimately make the appointment for and on behalf of both sides. Additionally, the clause also contemplated serving Railway officers being appointed as Arbitrators.

11. Accordingly, and for all the aforesaid reasons, the instant petition is allowed."

16. In light of the aforesaid discussion, the Court finds itself unable to sustain the appointment procedure as contemplated under Clause 64(3)(a)(ii). The Court also takes note of the submission of Mr. Varma learned senior counsel who had submitted that while the petitioner has already nominated its arbitrator, since the respondent has failed to make a nomination and has in any case forfeited its right to do so consequent to the present petition being filed, its nominee arbitrator may be appointed by this Court itself in exercise of powers conferred under by Section 11 of the Act.

17. Accordingly, and for all the aforesaid reasons, the present petition is allowed. The Court hereby Mr. Justice Jayant Nath [Official Address: 23 Babar Lane, near Bengali Market, New Delhi] [Mobile No. 8527959494] [email: jayant238@yahoo.co.in] as the nominee arbitrator of the respondent. The two nominated arbitrators shall now proceed to designate a Presiding Arbitrator.

18. The parties are directed to appear before the nominated arbitrator, as and when notified. This is subject to the nominated arbitrator making the necessary disclosures under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act.

19. The fees of the nominated arbitrator shall be decided according to the Fourth Schedule of the Act.

YASHWANT VARMA, J.

MARCH 23, 2023 SU