

M/S Ashoka Enterprises vs Union Of India on 18 April, 2023

Author: Yashwant Varma

Bench: Yashwant Varma

\$~8

*

+

IN THE HIGH COURT OF DELHI AT NEW DELHI
ARB.P. 573/2022
M/S ASHOKA ENTERPRISES

Through: Ms. Pooja Dua, Mr. SW Naidu
& Mr. Ashok Gulati, Advs. Peti

versus

UNION OF INDIA

Through: Mr. Anurag Ahluwalia (CGSC),
Mr. Abhigyan Siddhant (GP) &
Mr. Rohit Kumar, Advs. for R-
1 Respon

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA
ORDER

% 18.04.2023

1. This petition under Section 11 of the Arbitration and Conciliation Act, 1996 has been preferred for constitution of an Arbitral Tribunal in light of the disputes having arisen inter partes. Pursuant to the notices having been issued, the respondent has entered appearance and have filed a reply.

2. Mr. Ahluwalia, learned CGSC draws the attention of the Court to the pleas taken in paragraph 9 and in terms of which it is contended that since the petitioner did not submit the waiver as contemplated under Section 12(5) of the Act, the respondent chose not to constitute the Arbitral Tribunal. Additionally, learned counsel had drawn the attention of the Court to the relevant clause of the agreement itself to submit that in terms thereof the Arbitral Tribunal was to comprise of three gazetted Railway Officers to be duly nominated by the respondent.

3. The Court notes that insofar as the question of a waiver is concerned, what Section 12(5) contemplates is a consensual action of parties. The respondents cannot possibly compel the petitioner to waive the disqualifications which would attend to the appointment of an arbitrator in terms of the provisions contained in Schedule VI and VII of the Act. The relevant arbitration clause which is relied upon reads as follows: -

"Clause 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."

It becomes significant to note that the aforesaid clause is clearly distinct from Clause 64 which had fallen for consideration of the Supreme Court in *Central Organisation for Railway Electrification vs. ECI-SPIC-SMO-MCML (JV)* [(2020) 14 SCC 712]. Dealing with the distinction which exists between Clause 64(3)(a)(ii) and Clause 64(3)(b), this Court in *Savronik System India Private Limited v. Northern Railways & Anr.*, [Order dated 23 March 2023 in ARB.P. 709/2022 and ARB.P. 712/2022] has held as under:-

"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 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 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 will simultaneously appoint the remaining arbitrators from the 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.⁷ as well as in Voestalpine Schienen GmbH v. DMRC⁸.

15. The Court notes that in a recent decision rendered by it in BSC Projects Private Limited v. Ircon International Limited,⁹ the Court while examining an identical appointment provision, had held as follows:-

(2020) 20 SCC 760 (2017) 4 SCC 665 Digitally Signed ARB.P. 39/2023 By:NEHA
Signing Date:25.04.2023 11:57:35 "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 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 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."

4. In view of the aforesaid, the Court finds itself unable to sustain the objections which are raised.

5. Accordingly, the instant petition is allowed. The Court hereby appoints Mr. Amar Nath, Former District & Sessions Judge, Delhi [Official Address: Flat No.- B-1, Plot No.-7, Sector-7, Dwarka, New Delhi] [Mobile No. 9958697030] [email: amarnathadsj@gmail.com] as the sole arbitrator for resolution of the disputes which have arisen.

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

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

YASHWANT VARMA, J.

APRIL 18, 2023 neha