

M/S Mago Construction Pvt. Ltd. vs Union Of India Through Director ... on 28 March, 2025

Author: Sachin Datta

Bench: Sachin Datta

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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment pronounced on

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ARB.P. 1669/2024

M/S MAGO CONSTRUCTION PVT. LTD.

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Through: Ms. Simran Mehrotra, Advocate.

versus

UNION OF INDIA THROUGH DIRECTOR

GENERAL, MARRIED ACCOMODATION PROJECT & ANR.

.....Respon

Through: Mr. B.S. Shukla, CGSC and Mr.

Gokul Sharma, GP.

CORAM:

HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

1. The present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter 'the A&C Act') seeks constitution of an arbitral tribunal to adjudicate the disputes between the parties.

2. The disputes between the parties have arisen in the background of a notice inviting tender dated 25.07.2014 bearing no. OGMAP/PHASE II/AGRA/PKG-15(R&C) of 2014-2015 (hereinafter 'the NIT') relating to the "completion of balance works of construction of residential accommodation at Agra" for a consideration of Rs. 78.50 crores. The work under the said contract agreement was required to be completed in five phases, across a period of 25 months from the date of handing over of the site.

3. A bid was submitted by the petitioner, in response to which, a work order dated 02.02.2015 was issued in favour of the petitioner wherein the date of handing over of the site was mentioned as 19.02.2015.

4. Disputes between the parties have arisen on account of non-payment of the alleged monetary entitlement/s of the petitioner and alleged breach of the terms stipulated in the NIT.

5. Clause 60 of the General Conditions of Contract (GCC), which forms part of the NIT, contains the arbitration agreement and reads as under -

"60. Arbitration.

All disputes, between the parties to the contract (other than those for which the decision of the DG MAP or any other person is by the contract expressed to be final and binding) shall, after written notice by either party to the contract to the other of them, be referred to the sole arbitration of serving officer having degree in Engineering or equivalent or having passed final/Direct Final Examination of Sub Division II of Institution of Surveyors (India) recognised by the Govt. of India to be appointed by the Engineer- in-Chief, Army Headquarters, New Delhi or in his absence, the officer officiating as Engineer-in-Chief or Director General of Works if specifically delegated in writing by Engineer-in-Chief, Army Headquarters, New Delhi whose decision shall be final, conclusive and binding. The Arbitration shall be governed by Arbitration and Conciliation Act, 1996.

Unless both parties agree in writing, such reference shall not take place until after the completion or alleged completion of the Works or termination or determination of the contract under Condition Nos. 49 and 50 hereof.

Provided that in the event of abandonment of the works or cancellation of the Contract under Condition Nos. 46, 47 or 48 hereof, such reference shall not take place until alternative arrangements have been finalised by the Government to get the works completed by or through any other Contractor or Contractors or Agency or Agencies.

Provided always that commencement or continuance of any arbitration proceedings hereunder or otherwise shall not in any manner militate against the Government's right of recovery from the contractors as provided in condition 57 hereof.

If the arbitrator so appointed resigns his appointment or vacates his office or is unable or unwilling to act due to any reason whatsoever, the authority appointing him may appoint a new Arbitrator to act in his place:

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties, asking them to submit to him their statement of case and pleading in defense.

The Arbitrator may proceed with the arbitration, *ex parte*, if either party, in spite of a notice from the Arbitrator, fails to take part in the proceedings.

The Arbitrator shall give his reasoned award in writing on all matter referred to him and shall indicate his findings, alongwith sums awarded, separately on each individual item of dispute. The venue of arbitration shall be such place or places as may be fixed by the Arbitrator in his discretion.

The award of the Arbitrator shall be final and binding on both the parties to the Contract."

6. Disputes having arisen, a notice invoking arbitration dated 23.05.2024 was issued by the petitioner addressed to the Director General, Married Accommodation Project (respondent no.1). Vide a separate communication on the same date, that is, 23.05.2024, the petitioner called upon the respondent no.2 to appoint an independent sole arbitrator instead of a serving officer in terms of Clause 60 GCC. However, no response has been received thereto. Hence, the present petition.

7. Learned counsel for the petitioner submits that given the technical nature of the claims raised by it against the respondents, it is apposite to appoint a sole arbitrator from a panel of arbitrators constituted by the Ministry of Defence vide letter bearing no.13600/ ARB/ MoD (PoA)/ 98/EB dated 07.02.2022 inasmuch as the persons on the said panel of arbitrators have the necessary specialized knowledge and experience to adjudicate the disputes between the parties in the present case.

8. Learned counsel for the petitioner has also proposed a list of 5 names out of the aforesaid panel which consists of 21 persons, all of whom, are retired employees from various departments of the Central Government.

9. While the learned counsel for the respondents has not disputed the existence of the arbitration agreement and has acceded to the appointment of a sole arbitrator to adjudicate the disputes between the parties, he submits that the sole arbitrator cannot be appointed from the aforesaid panel of arbitrators constituted by the Ministry of Defence inasmuch as the said panel is "highly restrictive and not broad based in nature".

10. Reliance in this regard is placed on the judgment of this Court in Kalyan Toll Infrastructure Ltd. v. Union of India 2024 SCC OnLine Del 1525 wherein the Court examined the validity of the appointment of a sole arbitrator from the said panel and it was held as under -

"28. I consider that the panel of arbitrators as offered by the respondent in the present case is highly restrictive in nature. It is neither broad-based nor is there any 'counter-balancing'. It is also pertinent to mention that entire panel of MOD is consisting of senior retired officers. There is no person from the legal background. In the circumstances, there is no person from the legal background. In the circumstances, panel is restrictive and not broad-based. In such cases, the jurisdiction of the court to appoint a sole Arbitration cannot be taken."

11. Learned counsel for the respondents has, instead, proposed a list of three persons consisting of retired high court judges, out of which the sole arbitrator may be appointed.

12. It is now authoritatively settled in terms of the judgment of the Supreme Court in Central Organisation for Railway Electrification v. ECI- SPIC-SMO-MCML (JV) 2024 SCC OnLine 3219 that unilateral appointment of arbitrators (as provided for in the present arbitration agreement) is an anathema to the A&C Act 1996 and that it is incumbent on this Court to appoint an independent sole arbitrator. The relevant portion in Central Organisation for Railway Electrification v. ECI-SPIC-SMO- MCML (JV) (supra) is as under -

"161. By agreeing to arbitrate in a public-private contract, the government or its companies agree to settle their disputes with private contractors through arbitration. Since the activities of the government have a public element, it is incumbent upon the government to ensure that it enters into a contract with the public without adopting any unfair or unreasonable procedure. Every action of a public authority or a person acting in the public interest or any act that gives rise to a public element must be based on principles of fairness and non- arbitrariness. Therefore, government agencies have to consider the principles of equality and non-arbitrariness when crafting arbitration procedures, including the procedure for the appointment of arbitrators. The terms of the arbitration agreement must meet the minimum standards of equality and fairness. In a public-private contract, the government and its instrumentalities must ensure that the arbitral process contemplated by the contract is also fair to the other party to avoid arbitrariness.

162. The possibility of bias is real in situations where an arbitration clause allows a government company to unilaterally appoint a sole arbitrator or control the majority of the arbitrators. Since the government has control over the arbitral tribunal, it can chart the course of the arbitration proceedings to the prejudice of the other party. Resultantly, unilateral appointment clauses fail to provide an effective substitute for judicial proceedings in India. Further, a unilateral appointment clause is inherently exclusionary and violates the principle of equal treatment of parties and procedural equality.

163. Unilateral appointment clauses in a public-private contract fail to provide the minimum level of integrity required in authorities performing quasi-judicial functions such as arbitral tribunals. Therefore, a unilateral appointment clause is against the principle of arbitration, that is, impartial resolution of disputes between parties. It also violates the nemo iudex rule which constitutes the public policy of India in the context of arbitration. Therefore, unilateral appointment clauses in public-private contracts are violative of Article 14 of the Constitution for being arbitrary in addition to being violative of the equality principle under the Arbitration Act."

(emphasis supplied)

13. Further, in view of the observations made by this Court in *Kalyan Toll Infrastructure Ltd. v. Union of India* (supra) and in view of the objections raised on behalf of the learned counsel for the respondents, this Court does not find it apposite to appoint a sole arbitrator from the aforesaid panel constituted by the Ministry of Defence.

14. Given that there is no controversy as regards existence of the arbitration agreement, there is no impediment to constituting an independent arbitral tribunal for adjudicating the disputes between the parties, as mandated in terms of the judgments of the Supreme Court in *SBI General Insurance Co. Ltd. v. Krish Spinning* 2024 INSC 532 and *In Re: Interplay between Arbitration Agreements*

under the Arbitration & Conciliation Act, 1996 & the Indian Stamp Act, 1899 2023 SCC OnLine SC 1666.

15. Accordingly, Ms. Justice (Retd.) Rekha Palli, Former Judge, Delhi High Court (Mobile No. 9810012120) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

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

17. The learned sole arbitrator shall be entitled to fee in accordance with the IVth Schedule to the A&C Act; or as may otherwise be agreed to between the parties and the learned sole arbitrator.

18. Both parties shall be at liberty to raise preliminary objections as regards arbitrability/jurisdiction, if any, which shall be decided by the arbitrator, in accordance with law.

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

20. Needless to say, nothing in this order shall be construed as an expression of opinion of this court on the merits of the case.

21. The present petition stands disposed of in the above terms.

SACHIN DATTA, J MARCH 28, 2025/dn