

HIGH COURT OF JUDICATURE AT ALLAHABAD

Arbitration & Conciliation Application U/s 11(4) No. 109 of 2021

Pronounced on: January 06, 2023

M.J.S. Construction and others ... Applicants

Through:- Mr. Bharat Kishore Srivastava, Advocate

v/s

Union of India and others ... Opposite Party

Through:- Mr. Prashant Mathur, Advocate
for respondents no. 3, 4 and 6

CORAM: HON'BLE RAJESH BINDAL, CHIEF JUSTICE

ORDER

1. The prayer made in the present application filed under Section 11(6) of the Arbitration and Conciliation Application Act, 1996 (hereinafter referred to as the "Act") is for appointment of an Arbitrator for resolution of dispute between the parties.

2. The arguments, raised by learned counsel for the applicant, are that upon participating in the tender, the applicant-firm was issued Work Order No. 15 dated August 18, 2015 for construction of 30 bedded hospital in Cantt. General Hospital, Kanpur. As per applicant-firm, when after completion of the work final bill amounting ₹3,17,98,239.70 was produced for payment, an amount of ₹53,60,466.51/- remained unpaid. The applicant kept on requesting the respondents to release the balance payment, however, when for quite long time, the payment was not made despite

repeated requests made by the applicant-firm, the applicant invoked arbitration clause as contained in Clause 25 of General Conditions of Contract for Central P.W.D. Works, 2014 seeking appointment of an Arbitrator for resolution of dispute between the parties, for the purpose notice dated July 9, 2021 was issued. However, respondents vide letter dated October 8, 2021 refused to appoint Arbitrator stating that there is no need for appointment of Arbitrator as Clause-16 of the contract agreement dated December 26, 2014 excludes the dispute from the purview of arbitration and it shall be decided by the Board which shall be conclusive and binding on the contractor.

3. He further submitted that rejection of request of the applicant for appointment of Arbitrator placing reliance on Clause 16 of agreement is totally illegal as in terms of the Clause-16 of the agreement, the decision taken by the respondent is final and thus no remedy is left with the applicant. Any such condition would be in violation of Section 28 of the Contract Act, as the applicant cannot be made remediless for resolution of his grievance.

4. On the other hand, learned counsel for the respondent submitted that entire amount due to the applicant has already been paid, hence there is no dispute pending for which Arbitrator need be appointed.

5. He further submitted that there was no sanction granted for the additional work allegedly executed by the applicant, hence, no payment could be made. Regarding application of Clause-16 of the agreement dated December 26, 2014, he submitted that 25 of General Conditions of Contract provides that the same shall be applicable except where otherwise provided in the contract. In the case in hand, Clause-16 of the agreement dated December 26, 2014 clearly provides that the decision on the issue by the Board/CEO will be final and thus no arbitrator can be appointed.

6. Heard learned counsel for the parties and perused the record.

7. Clause 25 of General Conditions of Contract provides for an arbitration clause. It reads as under:

Clause 25

Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, design, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:

(i) If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the Engineer-in-Charge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Superintending Engineer in writing for written instruction or decision. Thereupon, the Superintending Engineer shall give his written instructions or



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decision within a period of one month from the receipt of the contractor's letter.

If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of Superintending Engineer's decision, appeal to the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractor's appeal.

If the contractor is dissatisfied with the decision of the Chief Engineer, the contractor may within 30 days from the receipt of the Chief Engineer decision, appeal before the Dispute Redressal Committee (DRC) along with a list of disputes with amounts claimed in respect of each such dispute and giving reference to the rejection of his disputes by the Chief Engineer. The Dispute Redressal Committee (DRC) shall give his decision within a period of 90 days from the receipt of Contractor's appeal. The constitution of Dispute Redressal Committee (DRC) shall be as indicated in Schedule 'F'.

If the Dispute Redressal Committee (DRC) fails to give his decision within the aforesaid period or



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any party is dissatisfied with the decision of Dispute Redressal Committee (DRC), then either party may within a period of 30 days from the receipt of the decision of Dispute Redressal Committee (DRC), give notice to the Chief Engineer for appointment of arbitrator on prescribed proforma as per Appendix XV, failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

(ii) Except where the decision has become final, binding and conclusive in terms of Sub Para (i) above, disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Chief Engineer, CPWD, in charge of the work or if there be no Chief Engineer, the Additional Director General of the concerned region of CPWD or if there be no Additional Director General, the Director General of Works, CPWD. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever, another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute



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along with the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.

It is also a term of this contract that no person, other than a person appointed by such Chief Engineer CPWD or Additional Director General or Director General, CPWD, as aforesaid, should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the Government shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.



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It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs. 1,00,000/-, the arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the arbitrator, these shall be paid equally by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid.”

8. The fact that the aforesaid clause is applicable to the contract in question was not a matter of dispute as the same was

neither denied by the respondent in reply to the notice issued by the applicant seeking appointment of Arbitrator referring to that clause nor even in the counter affidavit filed to the application. The only ground raised for rejection of the prayer of the applicant for appointment of arbitrator was Clause 16 of the agreement dated December 26, 2014 in terms whereof for specification and the quality of materials, the decision of the Board/CEO shall be final. The same reads as under:

“16. If and whenever any dispute hereinafter arise relating to the meaning of specification and the quality of materials of the work or any other matter relating to the contractor, the decision of the Board/CEO shall be conclusive, and, binding on the contractor.”

9. In **Bharat Sanchar Nigam Ltd. and others Vs. Motorola India Pvt. Ltd. (2009) 2 SCC 337**, the judgment of the Kerala High Court appointing the Arbitrator was challenged before Hon’ble the Supreme Court in appeal by BSNL. While upholding the appointment of the Arbitrator by the High Court, the appeal preferred by the BSNL was dismissed.

10. In the aforesaid case, the contract between the parties was executed in respect of turn key solution of supply, installation and commissioning of Indian Mobile Communications System. Clause 16.2 of the contract provided that in case the delayed portion of the delivery materially hampers effective user of the system, liquidated damages shall be levied on the total value of concerned package of the purchase order. It further provided that the quantum of liquidated damages assessed and levied by the purchaser shall be final and not challengeable by the supplier. The said clause 16.2 reads as under:

"16.2. Should the tenderer fail to deliver the goods and services on turn key basis within the period prescribed, the purchaser shall be entitled to recover 0.5% of the value of the delayed quantity of the goods & services, for each week of delay or part thereof, for a period upto 10 weeks and thereafter at the rate of 0.7% of the value of the delayed quantity of the goods and services for each week of delay or part thereof for another 10 weeks of delay. In the present case of turn key solution of supply, installation and commissioning, where the delayed portion of the delivery and provisioning of services materially hampers effective user of the systems, Liquidated Damages charged shall be levied as above on the total value of the concerned package of the purchase order. Quantum of liquidated damages assessed and levied by the purchaser shall be final and not challengeable by the supplier."

11. The arbitration clause in the agreement provided that any question, dispute or difference arising under the agreement or in connection therewith (except as to the matters, the decision to which is specifically provided under this agreement), shall be referred to the sole arbitrator. The said clause 20.1 is reproduced hereinunder:

"20.1 In the event of any question, dispute or difference arising under this agreement or in connection there-with (except as to the matters, the decision to which is specifically provided under this agreement), the same shall be referred to the sole arbitration of the CGM, Kerala Telecom Circle, BSNL or in case his designation is changed or his office is abolished, then in

such cases to the sole arbitration of the officer for the time being entrusted (whether in addition to his own duties or otherwise) with the functions of the CGM, Kerala Telecom Circle, BSNL or by whatever designation such an officer may be called (hereinafter referred to as the said officer), and if the CGM Kerala Telecom Circle or the said officer is unable or unwilling to act as such, then to the sole arbitration of some other person appointed by the CGM, Kerala Telecom Circle or the said officer. The agreement to appoint an arbitrator will be in accordance with the Arbitration and Conciliation Act, 1996.

There will be no objection to any such appointment on the ground that the arbitrator is a Government Servant or that he has to deal with the matter to which the agreement relates or that in the course of his duties as a government servant he has expressed his views on all or any of the matters in dispute. The award of the arbitrator shall be final and binding on both the parties to the agreement. In the event of such an arbitrator to whom the matter is originally referred, being transferred or vacating his office or being unable to act for any reason whatsoever, the CGM, Kerala Telecom Circle, BSNL or the said officer shall appoint another person to act as an arbitrator in accordance with the terms of the agreement and the person so appointed shall be entitled to proceed from the stage at which it was left out by his predecessors "



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12. The Supreme Court held that the clause with respect to quantification of liquidated damages being final and not amenable to judicial scrutiny is clearly in restraint of legal proceedings under Section 28 of the Indian Contract Act, 1872 (hereinafter referred to as the “Contract Act”). Accordingly, the Court held the clause to be bad in the eyes of law. Relevant para-17 is extracted below:

“38. The provision under clause 16.2 that quantification of the Liquidated Damages shall be final and cannot be challenged by the supplier Motorola is clearly in restraint of legal proceedings under section 28 of the Indian Contracts Act. So the provision to this effect has to be held bad.”

13. In **ICOMM Tele Ltd. Vs. Punjab State Water Supply Sewerage Board and others (2019) 4 SCC 401**, the Punjab State Water Supply and Sewerage Board, Bhatinda issued notice inviting tender for extension and augmentation of water supply, sewerage scheme etc. for various towns on a turn key basis. The appellant-company was awarded tender and a formal contract was executed between the parties. Clause -25 (viii) of the contract is set out as follows:

“viii. It shall be an essential term of this contract that in order to avoid frivolous claims the party invoking arbitration shall specify the dispute based on facts and calculations stating the amount claimed under each claim and shall furnish a “deposit-at-call” for ten percent of the amount claimed, on a schedule bank in the name of the Arbitrator by his official designation who shall keep the amount in deposit till the announcement of the award. In the event of an award in

favour of the claimant, the deposit shall be refunded to him in proportion to the amount awarded w.r.t the amount claimed and the balance, if any, shall be forfeited and paid to the other party.”

14. The Supreme Court, while striking out the aforesaid condition holding it to be arbitrary, observed as under:

“24. Further, it is also settled law that arbitration is an important alternative dispute resolution process which is to be encouraged because of high pendency of cases in courts and cost of litigation. Any requirement as to deposit would certainly amount to a clog on this process. Also, it is easy to visualize that often a deposit of 10% of a huge claim would be even greater than court fees that may be charged for filing a suit in a civil court.

X X X X

27. Deterring a party to an arbitration from invoking this alternative dispute resolution process by a pre-deposit of 10% would discourage arbitration, contrary to the object of de-clogging the Court system, and would render the arbitral process ineffective and expensive.”

15. In **Bharat Sanchar Nigam Ltd.’s (supra)**, a clause in the agreement, in terms whereof liquidated damages levied was to be final and not challengeable by the supplier, was held to be in violation of Section 28 of the Contract Act. It was also held that it would also defeat the notions laid down under the principles of

natural justice wherein it has been recognized that a party cannot be a judge of its own cause ('nemo judex in causa sua'). Any decision unilaterally taken by the Board or CEO would fall in the same category. Instead of promoting the alternative dispute resolution mechanism, the respondent-Board herein became judge of his own cause.

16. In **ICOMM Tele Ltd.'s case (supra)**, even a clause in the agreement providing that before invoking the arbitration clause, a pre-deposit of ten per cent is required, was held to be arbitrary.

17. For the reasons mentioned above, in my opinion, Clause-16 of the agreement in question providing for decision of the Board/CEO on certain issues to be final is clearly violative of Section 28 of Contract Act. If that clause is taken out of the agreement executed between the parties, Clause-25 of General Conditions of Contract comes into picture.

18. In Clause 25 of General Conditions of Contract, a detailed procedure has been provided for resolution of dispute. Initially a request is to be made to the Superintending Engineer. On his failure to give decision, an appeal is maintainable to the Chief Engineer whereafter the matter can be considered by Dispute Redressal Committee. Any of the party dissatisfied with the order of Dispute Redressal Committee can give notice to the Chief Engineer for appointment of Arbitrator. The matter is required to be referred to sole Arbitrator to be appointed by Chief Engineer.

19. However, in the case in hand, the applicant, in the notice dated July 9, 2021, while invoking the arbitration clause, has clearly stated therein absence of the aforesaid authorities and the Dispute Redressal Committee in the respondent-Department. This fact having not been controverted by the respondent, in my view,

the applicant has rightly invoked the arbitration clause directly seeking appointment of Arbitrator for resolution of dispute between the parties.

20. Now I come to the aspect regarding appointment of Arbitrator by Chief Engineer, as provided under Clause 25, or any other authority of the respondent. The Supreme Court in **Perkins Eastman Architects DPC and another Vs. HSCC (India) Limited AIR 2020 SC 59**, considering the issue as to whether an ineligible persons can nominate an arbitrator, quoted the following from **TRF Ltd. vs. Energo Engineering Projects Ltd (2017) 8 SCC 377**:

“By our analysis, we are obligated to arrive at the conclusion that once the arbitrator has become ineligible by operation of law, he cannot nominate another as an arbitrator. The arbitrator becomes ineligible as per prescription contained in Section 12(5) of the Act.”

21. Referring to and relying on the above authority on the issue in **TRF Ltd.’ case (supra)** The Court in **Perkins Eastman Architects’ case (supra)** held:

“But, in our view that has to be the logical deduction from TRF Limited (2017) 8 SCC 377. Paragraph 50 of the decision shows that this Court was concerned with the issue, "whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an Arbitrator" The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must

not only be ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator.”

(emphasis supplied)

22. In order to examine the application of the above exposition of law to the case in hand, it would be appropriate to go through the relevant provision of the Act.

23. Section 12(5) of the Act is quoted below:

“12.(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.”

24. The Seventh Schedule of the Act is quoted below:

“Arbitrator’s relationship with the parties or counsel

1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.

X X X X

5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

X X X X

12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.”

25. In the case in hand, Clause 25(ii) of the General Conditions of Contract providing for appointment of an Arbitrator Chief Engineer, CPWD, in charge of the work or if there be no Chief Engineer, the Additional Director General of the concerned region of CPWD or if there be no Additional Director General, the Director General of Works is clearly in the teeth of Section 12(5) of the Act, as I am clearly of the view that the above authorities, falling under category-1 of the Seventh Schedule of the Act and thereby being ineligible to be appointed as Arbitrator, are also ineligible to nominate an Arbitrator for resolution of dispute between the parties.

26. Therefore, in my considered view, Sub-clause (ii) of Clause 25 of General Conditions of Contract, to the extent it provides for appointment of an Arbitrator by the Chief Engineer, or Additional Director General or Director General is liable to be skipped. If the aforesaid provision, to the above extent, is taken out of the general conditions of contract, in my view, the Arbitrator for resolution of dispute between the parties needs to be appointed by this Court.

27. Accordingly, this Court appoints Hon'ble Mr. Justice Arun Tandon, a retired Judge of this Court as Arbitrator, subject to His Lordship's consent in terms of provisions contained in Section 11(8) read with Section 12(1) of the Act by sending a request letter to him. His Lordship's address is 3, Patrika Marg, Civil Lines, Allahabad, mobile number is 9415214462 and e-mail is "tandonarun30@gmail.com".

28. The matter is referred to the Arbitrator for resolution of the dispute between the parties. The Arbitrator shall be paid fees as per the schedule attached to the Act.

29. The present application is disposed of.

30. In case, the Arbitrator recuses, the matter shall be listed before the Court itself for further orders.

(Rajesh Bindal, C.J.)

Allahabad
January 06, 2023
P. Sri

Whether the order is speaking :	Yes/No
Whether the order is reportable :	Yes