



2024:DHC:5677



\$~61

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **ARB.P. 1223/2023**

**M/S KAMLADITYYA CONSTRUCTION PVT
LTD**

.....Petitioner

Through: Mr. Avinash Trivedi, Ms.
Ritika Trivedi, Mr. Harleen Singh, Mr.
Harkeerat Singh, Mr. Jatin Arora, Mr.
Rhytham Nagpal, Mr. Anurag Kaushik and
Mr. Rahul Aggarwal, Advocates

versus

RAIL LAND DEVELOPMENT AUTHORITYRespondent

Through: Ms. Rashmi Malhotra and Mr.
Arnab Chanda, Advocates

CORAM:

HON'BLE MR. JUSTICE C.HARI SHANKAR

JUDGMENT (ORAL)

31.07.2024

%

1. The petitioner was awarded an EPC¹ contract by the respondent on 30 October 2019 by the Indian Railways Stations Development Corporation Ltd² on 30 October 2019 for construction of a Railway Station at Bijwasan.

2. Subsequently, by deed of novation dated 7 January 2022, the work was handed over by the IRSDC to the respondent Rail Land Development Authority³.

3. The contract between the petitioner and the IRSDC envisaged

¹ Engineering, Procurement and Construction

² IRSDC



2024:DHC:5677



resolution of disputes by arbitration. The arbitration clause read thus :

“26.3 Arbitration

Subject as hereinafter provided, any Dispute arising out of or in connection with, this Agreement and not settled by Section 26.1 or Section 26.2 above may regardless of the nature of the Dispute be submitted by either party to arbitration and finally settled in accordance with Indian Arbitration and Conciliation Act, 1996 as amended by the Arbitration and Conciliation (Amendment) Act, 2015 or any statutory amendment thereof.

Arbitration proceedings shall be held at New Delhi and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.

IRSDC shall appoint arbitrator/s from a panel of arbitrators (the “Arbitrator/s”) to carry out arbitration. Such panel of arbitrators shall be empanelled by IRSDC for the purpose of arbitration/s.

The decision of the majority of arbitrators shall be final and binding upon both parties. The expenses of the arbitrators shall be shared equally by the Authority and the Contractor. However, the expenses incurred by each party in connection with the preparation, presentation, etc of its case prior to, during and after the arbitration proceedings shall be borne by each party itself.”

4. According to the petitioner, there are considerable outstanding dues from the respondent in connection with the contracted work. As the respondent was not forthcoming regarding payment of the said amounts, the petitioner addressed a notice to the respondent on 10 October 2023, invoking Clause 26.3 of the contract and seeking reference of the disputes to arbitration. The total claim of the petitioner against the respondent as quantified in the said notice is ₹ 51,38,15,849.70.

5. The respondent, in its reply dated 25 October 2023, pointed out that the petitioner had earlier approached this Court in a writ petition, against the order in which LPA 736/2022 was preferred, and that the



2024:DHC:5677



Division Bench of this Court, in para 14 of its judgment dated 13 April 2023 disposing of the LPA, directed thus:

“14. Clause 26.3 of the EPC Contract provides for arbitration as the dispute resolution mechanism. It is apposite that the parties resolve this dispute by referring the dispute to arbitration in the manner and method prescribed therein. There being no case made out for interference, we are not required to delve into the merits of the matter.”

6. The petitioner has, in these circumstances, approached this Court by means of the present petition, contending that the petitioner cannot be forced into choosing the Arbitrator to arbitrate on the disputes from the panel provided by the respondent. As against this, Ms. Rashmi Malhotra, learned counsel for the respondent, relies on the judgment of the Supreme Court in *Central Organization for Railway Electrification v. ECI-SPIC-SMO-MCML (JV)*⁴.

7. Additionally, Ms. Malhotra submits that, in view of para 14 of the order dated 13 April 2023 whereby a Division Bench of this Court disposed of LPA 736/2022, there is no option but for the petitioner to select its panel from the list of arbitrators forwarded by the respondent to the petitioner.

Analysis

8. There is a fundamental difference between the arbitration clause which was subject matter of consideration before the Supreme Court in *CORE* and the arbitration clause that applies in the present case.



2024:DHC:5677



Clause 64(3)(b) of the General Conditions of Contract⁵ which applied in the **CORE** read thus :

“64. (3)(b) Appointment of Arbitrator where applicability of Section 12(5) of A&C Act has not been waived off.

The Arbitrator Tribunal shall consist of a Panel of three retired Railway Officer retired not below the rank of SAO officer, as the arbitrator. *For this purpose, the Railway 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 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 other from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the three arbitrators so appointed CM shall complete its 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.”

9. Section 12(5)⁶ of the Arbitration and Conciliation Act, 1996⁷ disentitles any person who is related to either of the parties to arbitration or to the subject matter of disputes, within any of the categories specified in the VII Schedule to the 1996 Act, from being appointed as an arbitrator. This is, however, subjected by the proviso to Section 12(5) to the parties expressly waiving the applicability of Section 12(5) in writing. The scope of Section 12(5) of the 1996 Act

⁵ GCC

⁶ (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.

Signature Not Verified
“the 1996 Act” hereinafter



2024:DHC:5677



has been expanded by the Supreme Court in *Perkins Eastman Architects DPC v. H.S.C.C. (India) Ltd*⁸, *Bharat Broadband Network Ltd v. United Telecoms Ltd*⁹ and *TRF Ltd v. Energo Engineering Projects Ltd*¹⁰ to hold that a person who is invalidated from acting as an arbitrator under Section 12(5) is equally invalidated from appointing an arbitrator to arbitrate on the disputes.

10. The offshoot of the afore-noted decisions of the Supreme Court is that any clause which enables one of the parties to the dispute to unilaterally appoint an arbitrator is *ex facie* invalid and incapable of implementation. Unlike the clause which was in consideration in *CORE*, which envisaged the Railways providing a panel of suggested Arbitrators to the contractor who had with him the option to choose a name out of the said panel, Clause 26.3 does not contemplate providing of any choice by the Railways to the contractor in the matter of choosing the arbitrator. Rather, the clause envisages the unilateral appointment of the Arbitrator, by the respondent, from the panel of arbitrators maintained by it. The clause is, therefore, squarely hit by *Perkins, Bharat Broadband* and *TRF*.

11. The Court cannot re-write the arbitration clause. Ms. Malhotra then sought to contend that, even if the respondent cannot be permitted to appoint the arbitrator, in view of the law laid down in *Perkins et al*, the petitioner should be directed to choose the arbitrator out of the panel suggested by the respondents.

⁸ (2020) 20 SCC 760

⁹ (2019) 5 SCC 755



2024:DHC:5677



12. This, however, would require the Court to rewrite the contractual arbitration clause, which is completely impermissible in law. The arbitration clause must stand, or fall, as it exists. The court cannot modify the arbitration clause to bring it in conformity with the law. The terms of the contract, executed *ad idem* by the parties, cannot thus be modified by the Court.

13. If the arbitration clause, as it exists in the contract between the parties, is illegal in view of the law enunciated in *Perkins, Bharat Broadband* and *TRF* and, consequently, unenforceable, it becomes *ex facie* invalid and has to be ignored. The Court cannot substitute, in its place, another arrangement by which the respondent provides a panel of arbitrators to the petitioner and the petitioner selects one out of the said panel. *CORE* was a case in which the arbitration clause between the parties expressly so provided and it was in that context that the Supreme Court held that the right of the Railways to provide a panel of arbitrators stood counter-balanced by the right of the contractor to select arbitrators out of the said panel. No such arrangement being envisaged by Clause 26.3 of the GCC which applies in the present case, the judgment in *CORE* would have no application.

14. Rather, the position that obtains is that, as Clause 26.3, to the extent it permits the respondent to unilaterally select an arbitrator, is in the teeth of *Perkins, Bharat Broadband* and *TRF*, it is, therefore, invalid and incapable of being enforced or implemented.

15. The order of the Division Bench of this Court in LPA 736/2022,



2024:DHC:5677



to the extent it refers to Clause 26.3 and directs the said clause to be followed, cannot be regarded as requiring that, even if the clause is violative of the law down by the Supreme Court, it must nonetheless be implemented.

16. In fact, the legality, or otherwise, of Clause 26.3 was never even in issue before this Court in LPA 736/2022 and para 14 of the order dated 13 April 2023 of the Division Bench cannot, therefore, be regarded as according judicial imprimatur to the validity of the Clause. LPA 736/2022, in which the said observation was returned, arose out of WP (C) 15398/2022, whereby the petitioner sought to challenge the decision of the respondent to terminate the EPC contract. The learned Single Judge held that, as the disputes were factual in nature and the EPC contract envisaged resolution of the disputes by arbitration, the petitioner was not justified in invoking Article 226 of the Constitution of India. It is this decision which was upheld by the Division Bench in LPA 736/2022 and subsequently by the Supreme Court in the SLP.

17. The observation that there was an arbitration clause in the agreement between the parties, by which the parties were bound, has to be understood in the context in which it was returned. The only sequitur of the said observation, as contained in the order passed by the Division Bench of this Court and by the Supreme Court would be that, instead of agitating their rights under Article 226 of the Constitution of India, the petitioner would have to seek recourse to arbitration, as the contract between the petitioner and the respondent contained an arbitration clause.



2024:DHC:5677



18. In the considered opinion of this Court, the order dated 13 April 2023 of the Division Bench and 6 July 2023 of the Supreme Court cannot be regarded as incorporating a mandamus to the Court to enforce the arbitration clause even if it is invalid in the light of the law laid down in *Perkins*, *Bharat Broadband* and *TRF*. The said orders no doubt would require the parties before the Court to be relegated to arbitration, but that must be in accordance with the law laid down by the Supreme Court.

19. Inasmuch as Clause 26.3 of the contract between the parties, as it stands, is invalid, as it permits unilateral appointment of the arbitrator by the respondent, the Court has no option but to exercise its jurisdiction under Section 11(6) of the 1996 Act and to appoint an Arbitrator.

20. Accordingly, this Court requests Hon'ble Ms. Justice Indermeet Kaur Kochhar (Tel. 9910384614), a learned retired Judge of this Court to arbitrate on the disputes between the parties.

21. The arbitration would proceed under the aegis of the Delhi International Arbitration Centre (DIAC) and the learned Arbitrator would be entitled to fees as per the Schedule of fees maintained by the DIAC.

22. The learned Arbitrator is also requested to submit the requisite disclosure under Section 12 of the 1996 Act within a week of entering on reference.



2024:DHC:5677



23. This Court has not expressed any opinion on merits. All aspects of fact and law, both with respect to preliminary objections as well as merits, would remain open to be urged before the learned arbitrator. Should the respondent seek to urge any counter claims, it would be at liberty to do so in accordance with law.

24. The petition is allowed in the aforesaid terms.

C.HARI SHANKAR, J

JULY 31, 2024/yg

Click here to check corrigendum, if any

Signature Not Verified

Digitally Signed By: AHT
KUMAR ARB.P. 1223/2023
Signing Date: 01.08.2024
16:41:51

Signature Not Verified

Digitally Signed
By: CHANDRASHEKHARAN
HARI SHANKAR
Signing Date: 01.08.2024
16:24:19