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

+ ARB.P. 862/2024

GJ (JV) COMPRISING OF M/S GODARA  
CONSTRUCTION COMPANY M/S JANDU  
CONSTRUCTION INDIA PVT. LTD.

.....Petitioner

Through: Mr. Vivekanand and Mr. Abhishek  
Sanwal, Advocates.

versus

UNION OF INDIA

.....Respondent

Through: Ms. Iram Majid, CGSC with Mr.  
Md. Suboor, Advocate.

**CORAM:**  
**HON'BLE MR. JUSTICE PRATEEK JALAN**

**ORDER**  
**09.07.2024**

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1. The petitioner has filed this petition under Section 11 of the Arbitration and Conciliation Act, 1996 [“the Act”] for appointment of an arbitrator to adjudicate disputes between the parties under a Contract Agreement dated 03.03.2022 [“the Contract”] for “*Construction of a 2-Lane Over Bridge consisting of Bow String Girder of 76.120 m C/C span (Launching in traffic block) and Bow String Girder of 64.130 m and 52.120 m C/C span (Launching not requiring in traffic block) and other allied works in lieu of L-Xing No. 20-C at Railway Km 32/12-14 between Rathdhana and Narela Railway station on Delhi-Ambala section and Construction of Road Under Bridge consisting of 01 (one) No. RCC box with internal dimension 9.0x5.65m by box pushing technique under*”

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*running Railway tracks and other allied works in lieu of L-Xing No. 26 (Gurugram-Dhanwapur Road) at Railway Km. 32/7-8 between Gurugram railway station and Basai Dhankot railway station on Deih-Rewari section of Delhi division”.*

2. The terms and conditions of the Contract admittedly include a clause [Clause 64] for the resolution of disputes by arbitration. The clause provides for a sole arbitrator in case the claims are of less than Rs.1 crore, and a three-member Tribunal in case the claims are of more than Rs.1 crore. The place of arbitration is specified as the geographical limits of the division of the Railways where the cause of action arose or the headquarters of the concerned Railway or any other place with the written consent of both the parties. In the present case, the place of arbitration in accordance with this clause is admittedly New Delhi.

3. As far as the appointment of the three member tribunal, including the contractor’s nominee, is concerned the Clause reads as follows:

*“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 Junior Administrative Grade or 2 Railway Gazetted Officers not below Junior Administrative Grade and a retired Railway Officer, retired not below the rank of Senior Administrative Grade Officer, as the arbitrators. **For this purpose, the Railway will send a panel of at least four (4) 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 General Manager.***

***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.** General Manager 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 Senior Administrative Grade of other departments of the Railway for the purpose of appointment of arbitrator.”

[Emphasis supplied.]

4. Disputes having arisen between the parties, the petitioner invoked arbitration by communication dated 27.02.2024. In the said communication, the respondent- Railways was requested to pay the amounts claimed by the petitioner, failing which the proceedings were to be referred to arbitration. The Railways did not respond to this communication, as a result of which the petitioner has approached this Court.

5. Notice was issued in this petition on 01.07.2024, when Ms. Iram Majid, learned Central Government Standing Counsel, sought time to take instructions. Ms. Majid today accepts that the Arbitral Tribunal has not been constituted in terms of the arbitration clause, but submits that the respondents are willing to take steps in this regard. She draws my attention to the judgment of the Supreme Court in *Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV)* [(2020) 14 SCC 712] and the judgment of this Court in *BCC Developers and Promoters (P) Ltd. v. DMRC* [2021 SCC OnLine Del 4837] to submit that the mechanism contemplated by the Contract should be given effect.

6. Mr. Vivekanand, learned counsel for the petitioner, on the other hand, submits that this Court, upon consideration of the very same clause, and the judgment in *Central Organisation for Railway Electrification*



[*supra*] has nevertheless proceeded to appoint an independent arbitrator. He draws my attention to a judgment dated 20.12.2023 in *The Braithwaite Burn and Jessop Construction Co Ltd. v. Northern Railway* [OMP (T) (COMM) 73/2022], wherein also the very same arbitration clause was considered. The Court referred to *Voestalpine Schienen GmbH v. Delhi Metro Rail Corpn. Ltd.* [(2017) 4 SCC 665] and found that a panel of four retired Railway Officials, from which the petitioner could choose one as its nominee, was manifestly not broad-based. To similar effect is the judgment of this Court in *Pradeep Vinod Construction Co. v. Union of India* [2023 SCC OnLine Del 179].

7. It is evident that clause 64.3(a)(ii), extracted above, not only restricts the petitioner's choice to serving or retired officers of Railways, but also compels the petitioner to choose its nominee from amongst four names suggested by the Railways. Further, the petitioner is required to suggest two out of the four names and the petitioner's nominee would also ultimately be appointed by the Railways itself. This procedure does not appear to be in consonance with the judgment in *Central Organisation for Railway Electrification [supra]*, as held by this Court in the authorities cited by Mr. Vivekanand. In any event, the Railways did not act in terms of the arbitration clause within the time stipulated, and cannot now object to the constitution of the Tribunal by the Court.

8. The judgment in *BCC Developers [supra]* is also distinguishable. It is clear from paragraph 22 of the said judgment that the Railways itself acted within the time prescribed in nominating the panel of arbitrators. Such is not the case here.

9. Mr. Vivekanand submitted that even though the petitioner's claims



exceed Rs.1 crore, instead of a panel of three arbitrators as required by Clause 64.3, the parties may consent to adjudication by a sole arbitrator. Ms. Majid, however, submits that she does not consent to such an appointment, in view of the quantum of disputes.

10. Having regard to this position, it would be appropriate for the contractual stipulation of a three-member Arbitral Tribunal to be adhered to.

11. In view of the above, the petition is disposed of with the direction that the parties may nominate one member each of their choice to the Arbitral Tribunal within a period of two weeks from today. The two members so appointed will be at liberty to appoint the presiding arbitrator, whereupon the Arbitral Tribunal will stand constituted.

12. It is made clear that this Court has not considered the maintainability or merits of the claims of the parties, which are left open for adjudication by the learned Arbitral Tribunal.

**PRATEEK JALAN, J**

**JULY 9, 2024**

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