

GAHC010105902024



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Arb. P. 35/2023

PCM CEMENT CONCRETE PVT. LTD.
A PRIVATE LIMITED COMPANY HAVING ITS OFFICE AND PLACE OF
BUSINESS AT PCM TOWER
3RD FLOOR 2ND MILE SEVOK ROAD
SILIGURI PIN-734001
DIST- DARJEELING (WEST BENGAL)
REPRESENTED BY ITS CONSTITUTED ATTORNEY SRI ASHOK KUMAR
AGARWALA

VERSUS

THE UNION OF INDIA AND ANR.
REPRESENTED BY THE GENERAL MANAGER
NORTH EAST FRONTIER RAILWAY
MALIGAON GUWAHATI-781011

2:THE CHIEF TRACK ENGINEER
N.F. RAILWAYMALIGAON
GUWAHATI-781011

Advocate for : MR. S SHARMA
Advocate for : DY.S.G.I. appearing for THE UNION OF INDIA AND ANR.

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA

ORDER

Date : 18.06.2024

Heard Mr. S. J. Sarma, learned counsel for the petitioner and Ms. A. Gayan,
learned CGC.

2. The present petition is for appointment of an Arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the '1996 Act').
3. The petitioner's case is that the petitioner entered into a contract agreement with the respondents to build and operate a 25,000 MT Capacity godown with private Siding under the Private Entrepreneurship Godown Scheme of the FCI. Consequently, contract agreement dated 02.07.2018 was executed between the parties. Disputes having arisen between the parties, the petitioner has filed this application for appointment of an Arbitrator, as Clause 64 of the contract agreement provides for resolution of disputes between the parties by way of arbitration, by constituting an Arbitral Tribunal, made up of members to be appointed by the General Manager, Northeast Frontier Railway.
4. The petitioner's counsel submits that though Clause 64.(3)(a)(ii) of the contract agreement provides that the dispute between the parties is to be referred to a 3 member Arbitral Tribunal to be constituted by the General Manager, N.F. Railway, the Arbitrator would have to be appointed by this Court and not by the General Manager, N.F. Railway. He submits that this is due to the fact that the General Manager, N.F. Railway cannot be appointed as an Arbitrator as he has an interest in the dispute and is not a neutral person. As such, the General Manager, N.F. Railway cannot in turn appoint any other Arbitrator.
5. The petitioner's counsel submits that due to the dispute between the parties, the respondent Railways wrote a letter to the petitioner, stating that an Arbitral Tribunal was to be constituted, in terms of Clause 64.(3)(a)(ii), which states 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 Officer 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.”

6. The petitioner’s counsel submits that the petitioner had been requested to waive his right under Section 12(5) of the Act, so as to enable the respondents to appoint 3 serving/retired Railway Officers to constitute the Arbitral Tribunal. The petitioner refused to waive his right under Section 12(5) of the Act and instead filed the present writ petition for appointment of an independent Arbitrator.
7. The petitioner’s counsel submits that subsequent to the filing of this writ petition, the respondents constituted an Arbitral Tribunal, consisting of 3 serving/retired Railway Officers to decide the dispute between the parties, vide letters dated 30.10.2023.
8. This Court, on hearing the parties, vide order dated 10.04.2024, had held

that as the petitioner had a right not to concede to the waiver of Section 12(5) of the Act, keeping in view the requirements of Section 12(5) and 7th Schedule of the Act, proposed an Arbitral Tribunal to consist of Hon'ble Mr. Justice C. R. Sarma (Retd.) as the Chairman of Arbitral Tribunal with Mr. Mrinal Kumar Bhattacharjee and Sri Pradip Kumar Das, who were both retired as District and Sessions Judge. Further, the Registry was also directed to communicate with the proposed Members of the Arbitral Tribunal, seeking disclosure, as provided under Sub-Section 8 of Section 11 of the Act. Consequent to the order dated 10.04.2024, reports have been received to the effect that the proposed Arbitrators were willing to take up the disputes between the parties.

9. Ms. A. Gayan, learned CGC submits that the arbitration clause provided in the contract agreement between the parties, provides for an Arbitral Tribunal made up of retired/serving Railway Officers and the petitioner was to suggest two names from among the list of four names that had been sent to him. However, the petitioner had not suggested any name for appointment of an Arbitrator. However, as the arbitration clause provided the manner in which the arbitration tribunal was to be constituted, the respondent railways had appointed Arbitrators, in terms of the arbitration clause provided in the contract agreement, vide letters dated 30.10.2023.

10. Ms. A. Gayan, learned CGC submits that the proposed Members of the Arbitral Tribunal made by this Court cannot be accepted, inasmuch as, the same is not in consonance with the Arbitration Clause. In the alternative, she submits that even if an Arbitral Tribunal is to be constituted, the same should consist of only one Arbitrator.

11. I have heard the learned counsels for the parties.

12. The question to be decided is as to whether the respondent Railways could have appointed serving/retired Railway Officers as Arbitrators, in the absence of any waiver given by the petitioner under Section 12(5) of the Act.

13. In the case of ***Perkins Eastmen Architects DPC and Anr Vs. HSCC (India) Limited***, reported in ***(2020) 20 SCC 760***, the Supreme Court has held that any person, who falls under any of the categories specified in the 7th Schedule, shall be ineligible to be appointed as an Arbitrator. Further, a person, ineligible to become an Arbitrator, cannot nominate another as an Arbitrator.

14. Thus, as per Section 12 of the 1996 Act and the law laid down by the Supreme Court in ***Perkins Eastman (supra)***, any person who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an Arbitrator. Further, a person who is statutorily ineligible to be an Arbitrator, cannot nominate another person as an Arbitrator.

15. In the case of ***TRF Ltd. Vs. Energo Engg. Projects Ltd., reported in (2017) 8 SCC 377***, the Supreme Court held that by virtue of Section 12(5) of the Act, if any person, who falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an Arbitrator, by operation of law. Secondly a person, ineligible to become an Arbitrator, cannot nominate another as an Arbitrator.

16. In view of the two judgments of the Supreme Court stated above and the fact that the application for appointment of an Arbitrator had been made subsequent to the amendment of Section 12 of the Act, this Court is of the view that the respondent Railways could not appoint/nominate Arbitrators from

amongst its own serving/retired officers, to decide the disputes between the parties.

17. Having stated the above, another 3 Judges Bench of the Supreme Court held a different view in ***Central Organization for Railway Electrification Vs. Ms. ECI-SPIC-SMO-MCML (JV) a Joint Venture Company***, reported in ***(2020) 14 SCC 712***

18. In the case of ***Central Organization for Railway Electrification (supra)***, the 3 Judges Bench of the Hon'ble Supreme Court held that when a contract agreement specifically provides for appointment of an Arbitral Tribunal consisting of 3 Arbitrators, from out of the panel of serving or retired railway officers, the appointment of the Arbitrator should be done in terms of the agreement as agreed by the parties. This judgment is in complete variance with the judgments passed in ***TRF Limited (supra)*** and ***Perkins Eastman (supra)***.

19. Due to the conflicting decisions of the Hon'ble Supreme Court and the subsequent decisions of the other Benches of the Supreme Court, like in the case of ***Union of India Vs. Tania Constructions Ltd.***, reported in ***(2021) SCC OnLine SC 271***, the conflicting decisions have been referred to a larger Bench for final resolution of the issue, with regard to whether the express terms provided in a contract agreement would hold sway while constituting an Arbitral Tribunal, in view of Section 12(5) and the 7th Schedule of the Act.

20. The issue that now arises is as to which judgment should be followed by this Court. In this regard, the learned CGC has taken this Court through the judgment of the Hon'ble Supreme Court in the case of ***Union Territory of***

Ladakh & Ors Vs. Jammu and Kashmir National Conference & Anr, reported in **2023 Legal Eagle (SC) 891**, wherein it has been held that when faced with conflicting judgments by Benches of equal strength of the Supreme Court, the earlier judgment has to be followed by the High Court, which would be in consonance with the decision of the Five Judges Bench of the Supreme Court in the case of **National Insurance Company Ltd. Vs. Pranay Sethi**, reported in **(2017) 16 SCC 680**.

21. Para 35 of the judgment of the Hon'ble Supreme Court in the case of **Union Territory of Ladakh (supra)** states as follows-

“35. We are seeing before us judgments and orders by High Courts not deciding cases on the ground that the leading judgment of this Court on this subject is either referred to a larger Bench or a review petition relating thereto is pending. We have also come across examples of High Courts refusing deference to judgments of this Court on the score that a later Coordinate Bench has doubted its correctness. In this regard, we lay down the position in law. We make it absolutely clear that the High Courts will proceed to decide matters on the basis of the law as it stands. It is not open, unless specifically directed by this Court, to await an outcome of a reference or a review petition, as the case may be. It is also not open to a High Court to refuse to follow a judgment by stating that it has been doubted by a later Coordinate Bench. In any case, when faced with conflicting judgments by Benches of equal strength of this Court, it is the earlier one which is to be followed by the High Courts, as held by a 5-Judge Bench in National Insurance Company Limited v. Pranay Sethi, (2017) 16 SCC 680. The High Courts, of course, will do so with careful regard to the facts and circumstances of the case before it.”

22. In the case of **M/s Barpeta Agro Infra vs. Union of India and 2 others (Arbitration Petition No. 51/2023)**, this Court was to decide the question as to whether the General Manager, N.F. Railway could appoint 3 Railway

Officers (retired/serving), as members of the Arbitral Tribunal in terms of Clause 34 of the contract agreement dated 02.07.2018.

23. By applying the judgment of the supreme Court in the case of ***Union Territory of Ladakh (supra)***, this Court held that it was bound to follow the earlier judgment of the Supreme Court, i.e., ***TRF Limited (Supra)*** wherein the Managing Director of N.F. Railway could not have constituted the members of the Arbitral Tribunal, in terms of Section 12(5) and the 7th Schedule of the Act.

24. Thus, it is clear that the respondent Railways could not have constituted an Arbitral Tribunal consisting of serving/retired Railway Officers, as it was not in consonance with Section 12(5) and 7th Schedule of the Act, in the absence of any waiver given by the petitioner to Section 12(5) of the Act.

25. In view of the reasons stated above, the Arbitral Tribunal constituted by the Railways, in terms of the letters dated 30.10.2023 are hereby set aside. As the respondents' alternative prayer is for appointment of a Single Arbitrator, this Court appoints Mr. Justice C. R. Sarma, retired Judge of this Court as an Arbitrator, to decide the dispute between the parties. The parties shall appear before the learned Arbitrator, within a period of one month from today. The disclosures required from the Arbitrator, in terms of Section 11(8) of the Act, have already been taken.

26. The arbitration petition is accordingly disposed of.

JUDGE

Comparing Assistant