

HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

209 - ARB No.76 of 2020 (O&M)

Date of Decision: 29.10.2020

Kumar Trading Company

... Petitioner

VS.

General Manager (Engineering),
Northern Railway & Anr.

... Respondents

CORAM: HON'BLE MR.JUSTICE GIRISH AGNIHOTRI

Present: Mr. Dheeraj Mahajan, Advocate for the petitioner

Mr. Karminder Singh, Advocate for the respondents

GIRISH AGNIHOTRI, J. (Oral)

(1) The petitioner-Kumar Trading Company has filed the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short 'the Act') (as amended) *inter alia* praying for appointment of Independent Arbitral Tribunal consisting of any suitable person as sole arbitrator to adjudicate the disputes between the parties arising out of the work agreement (P1) dated 29.08.2018.

(2) Learned counsel for the petitioner based upon the pleadings submits that on 29.08.2018 an agreement (P1) was entered into between the parties. The petitioner concerned was allotted the work namely 'provision of washable apron and PF No.1 and 2 at Pathankot under ADEN/PTK'. Learned counsel for the petitioner also makes reference to General Conditions of Contract (GCC) (P2) wherein Clause 64 of the arbitration agreement called the Arbitration Clause 64 has been reproduced. Learned counsel for the petitioner then submits that on 02.11.2019, a legal notice (P3) was issued wherein the representation was made on behalf of the petitioner under the GCC as well as the Arbitration and Conciliation Act, 1996. In the said notice,

various claims were raised and the respondent-Corporation was requested to consider the aforementioned claim of the petitioner-company and release the payments. It was specifically made clear that the petitioner was invoking the provision of Section 55 of the Contract Act due to contractual lapse on the part of the Department. However, when no response was received to the aforementioned legal notice/representation, vide legal notice dated 03.03.2020 (P4), the respondent-Corporation was put to notice that the aforementioned claims be referred to an independent and impartial Arbitrator as per the amended provisions of Act as amended on 23.10.2015 from the list of Arbitrators as maintained by the Punjab and Haryana High Court, Chandigarh within a stipulated period of 30 days from the date of receipt of notice.

(3) It is the specific case of the petitioner that respondents again failed to consider and act upon the said legal notice dated 03.03.2020. The further submission of learned counsel for the petitioner is that vide reply dated 24.06.2020 (P6), the petitioner had specifically made it clear to the respondents that no consent of Section 12(5) and relevant schedules i.e. Schedules V and VII of the Arbitration and Conciliation Act has been given by the petitioner. Learned counsel further refers to para 2(e) of the writ petition) to submit that *“the impugned letter 08.06.2020, respondents have wrongly referred to provisions of Clause 64(3)(b)(ii) of IGCC-2019 whereas the said provisions are not at all applicable as the petitioner remains to be governed by the unamended provisions of GCC as the agreement was entered in the year 2017-18. Therefore, the impugned letter dated 08.06.2020 is legally not sustainable”*.

(4) Learned counsel for the respondents submits that detailed reply has been filed on behalf of respondent No.2. He submits that the answering respondent wrote a letter to petitioner to select two names from the panel of four approved by the General Manager (Northern Railways) but the petitioner did not give the names. Reference is made to letter dated 08.06.2020 (R2/1).

(5) For the reasons mentioned herein, this Court accepts the prayer of the petitioner.

(6) Learned counsel for the petitioner has supplied a synopsis on whatsapp group. Reliance has been placed upon the judgment of this Court dated 17.03.2011 in **ARB No.24 of 2010 (M/s Akash Enterprises vs. The General Manager, Northern Railway & Ors.)**. A perusal of the said judgment would show that there was an agreement which was executed between the parties on 12.11.2007. The petitioner therein had raised a dispute on 28.05.2019 by addressing letter to the General Manager (Northern Railways), Delhi. It has been noticed in the judgment that the petition for appointment of Arbitrator was filed in February, 2010. In the said judgment, it was noticed that neither the General Manager nor respondent No.2 had appointed any Arbitrator before filing of the present petition. In the said judgment, reliance was further placed upon the judgments of the Hon'ble Supreme Court in (i) **Datar Switchgears Ltd. vs. Tata Finance Ltd. & Anr. (2000) 8 SCC 151** and (ii) **UOI vs. Bharat Battery Mfg. Co. (P) Ltd. (2007) 7 SCC 684**. The next contention of the respondents therein was that in terms of Clause 64(3)(a), the Arbitrator has to be the General Manager or a Gazetted Officer of Railways therefore in terms of Section 11(8) of the Act, the Arbitrator is required to be appointed having due regard to the terms of the agreement executed between the parties. However, this Court had taken a

view that the agreement does not contemplate any special qualification for appointment of Arbitrator who is to determine the dispute between the parties. In view of the facts as noticed above, a direction was issued by this Court to appoint an Arbitrator.

(7) Learned counsel also makes reference to judgment of Delhi High Court in ARB.P.779/2019 (M/s Arvind Kumar Jain vs. UOI) decided on 04.02.2020 wherein reliance was placed on the judgment of the Hon'ble Supreme Court in Perkins Eastman Architects DPC vs. HSCC (India) Ltd. (2019) SCC Online SC 1517. The relevant extract of the said judgment reads as under:-

“20. We thus have two categories of cases. The first, similar to the one dealt with in TRF Limited where the Managing Director himself is named as an arbitrator with an additional power to appoint any other person as an arbitrator. In the second category, the Managing Director is not to act as an arbitrator himself but is empowered or authorised to appoint any other person of his choice or discretion as an arbitrator. If, in the first category of cases, the Managing Director was found incompetent, it was because of the interest that he would be said to be having in the outcome or result of the dispute. The element of invalidity would thus be directly relatable to and arise from the interest that he would be having in such outcome or decision. If that be the test, similar invalidity would always arise and spring even in the second category of cases. If the interest that he has in the outcome of the dispute, is taken to be the basis for the possibility of bias, it will always be present irrespective of whether the matter stands under the first or second category of cases. We are conscious that if such deduction is drawn from the decision of this Court in TRF Limited, all cases having clauses similar to that with which we are presently concerned, a party to

the agreement would be disentitled to make any appointment of an Arbitrator on its own and it would always be available to argue that a party or an official or an authority having interest in the dispute would be disentitled to make appointment of an Arbitrator. But, in our view that has to be the logical deduction from TRF Limited. 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. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (Act 3 of 2016) and recognised by the decision of this Court in TRF Limited."

- (8) In view of the above, this Court accepts the submission of learned counsel for the petitioner. The petitioner's apprehension regarding the impartiality of the Arbitrator to be proposed by respondents is not

misfounded. This Court finds that respondents cannot be allowed to contend that only an Officer, may be retired Railway Officer, ought to be appointed as the Arbitrator. The respondents cannot compel the petitioner to furnish a waiver from the applicability of Section 12(5) of the Act.

(9) Therefore in the totality of the above circumstances, this Court is inclined to accept the petitioner's prayer for appointment of independent Arbitrator under Section 11 of the Act. Accordingly, the petition is allowed and after hearing learned counsel for the parties, Mr. Justice Ajay Kumar Mittal (Retd.), a former Chief Justice of Madhya Pradesh High Court, is appointed as the Sole Arbitrator. However, such appointment would be subject to the declaration to be made by Mr. Justice Ajay Kumar Mittal (Retd.), under Section 12 of the Act; with regard to his independence and impartiality to settle the disputes between the parties.

(10) The Arbitrator is requested to complete the proceedings within the time limit specified under Section 29A of the Act.

(11) The Arbitrator shall be paid fee in accordance with the Fourth Schedule of the Act, as amended or as may be mutually settled by the parties and the Arbitrator.

(12) A copy of the order be forwarded to Mr. Justice Ajay Kumar Mittal (Retd.), former Chief Justice of Madhya Pradesh High Court at the given address:-

*# 26, Sector 4
Chandigarh
M. No.9780008112
Landline No.0172-2740182*

(13) After seeking the convenience of the Arbitrator, the parties are directed to appear before him (through video conferencing, if suitable) within one month from the date of receipt of a certified copy of this order.

(14) The matter is disposed of in the above terms.

29.10.2020

Vvishal

(Girish Agnihotri)
Judge

1. *Whether speaking/reasoned?*

Yes/No

2. *Whether reportable?*

Yes/No