

**ARB-353-2023****-1-****IN THE HIGH COURT OF PUNJAB & HARYANA AT
CHANDIGARH****268****ARB-353-2023****Date of decision:20.05.2024****ISC PROJECTS PVT. LTD.****...PETITIONER****VS.****HARYANA RAIL INFR. DEVELOPMENT CORP. LTD.****...RESPONDENT****CORAM: HON'BLE MR. JUSTICE SUVIR SEHGAL**

Present: Mr. Shrey Goel, Advocate
for the petitioner.

Mr. Sandeep Vermani, Advocate
for the respondent.

SUVIR SEHGAL J. (ORAL)

1. By way of present petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, (for short "the Act"), read with the Scheme of appointment of Arbitrators by the Chief Justice of Punjab and Haryana High Court, 2003, petitioner has approached this Court for appointment of an independent Arbitrator.

2. Counsel for the petitioner submits that a contract agreement dated 15.07.2021, Annexure P-6, was entered into between the parties for construction of elevated BG railway line from KM 79/6 to KM 85/7. He submits that during the execution of the construction work, GST rates were increased from 12% to 18% and a dispute arose as to which of the



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two parties is liable to make payment of the increased tax. Counsel submits that as the claim exceeds Rs.2 crore, an Arbitral Tribunal comprising three members has to be appointed in terms of the arbitration clause in the contract agreement. A notice dated 03.05.2023, Annexure P-30, was served upon the respondent invoking the arbitration clause, to which, by letter dated 25.05.2023, Annexure P-31, respondent sent a panel of eight names to the petitioner for nominating two names as proposed Arbitrators. Counsel submits that as all the eight names are of officials, who have retired from the railways, they are not eligible for appointment of as Arbitrators.

3. Upon notice by this Court, reply has been filed by the respondent stating that any increase in the taxes has to be borne by the petitioner as per the terms of the contract. Mr. Sandeep Vermani, Advocate, who is representing the respondent, submits that Clause 64.3 of the General Conditions of the Contract (GCC), Annexure P-4, (at page 586 of the paper-book) provides for the appointment of an Arbitrator. He urges that out of the panel sent by the respondent, petitioner was to suggest two names as his nominees and the Managing Director was to appoint one of them to the three member arbitral tribunal as petitioner's nominee. Placing reliance upon the judgment in *Central Organization for Railway Electrification Vs. Eci-Spic-Smo-Mcml (JV) A Joint Venture Company (2020) 14 SCC 712*, he contends that the retired railway officials are eligible to be appointed as Arbitrators.

4. I have heard counsel for the parties and considered their



respective submissions.

5. Clause 64.3 of GCC came up for interpretation in ***Central Organization's case (supra)***. It was submitted before the Supreme Court that the clause has been modified and the Arbitral Tribunal shall consist of a panel of three retired railway officials, not below the rank of SAO and for this purpose, the railways will send a list of names of retired empanelled railway officials and the contractor will have to suggest minimum two nominees, out of which the General Manager will make one appointment. The General Manager will simultaneously appoint the other Arbitrators from the panel or from the outside. The modified clause 64 (3) (b) of GCC is as under:-

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

The Arbitral Tribunal shall consist of a panel of three retired railway officers retired not below the rank of SAO officer, as the arbitrator. For this purpose, the Railways 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 the Railways. 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 three arbitrators so appointed. The GM shall complete this 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."

6. Interpreting the above reproduced clause, the Supreme Court held as under:-

"39. There is an express provision in the modified clauses of General Conditions of Contract, as per Clauses 64(3)(a)(ii) and 64(3)(b), the Arbitral Tribunal shall consist of a panel of three gazetted railway officers [Clause 64(3)(a)(ii)] and three retired railway officers retired not below the rank of Senior Administrative Grade Officers [Clause 64(3)(b)]. When the agreement specifically provides for appointment of the Arbitral Tribunal consisting of three arbitrators from out of the panel of serving or retired railway officers, the appointment of the arbitrators should be in terms of the agreement as agreed by the parties. That being the conditions in the agreement between the parties and the General Conditions of the Contract, the High Court was not justified in appointing an independent sole arbitrator ignoring Clauses 64(3)(a)(ii) and 64(3)(b) of the General Conditions



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of Contract and the impugned orders cannot be sustained.”

7. In view of the dictum of the Supreme Court, the objection of the petitioner to the appointment of retired railway officials cannot be accepted.

8. Out of the panel of names sent by the respondent vide their communication dated 25.05.2023, Annexure P-31, Mr. Surender Kaul, Mr. Parmod Kumar, and Mr. Ravinder Kumar, mentioned at Sr. No.2, 3 and 8, respectively in the panel, are appointed as Arbitrators to adjudicate the dispute between the parties, subject to declaration to be made by him under Section 12 of the Act with regard to his independence and impartiality to adjudicate the dispute. In their first meeting, the Arbitrators will decide as to who amongst them would be the Presiding Arbitrator.

9. Parties are directed to appear before the Arbitral Tribunal on 10.07.2024 or on any day, time and place to be fixed and communicated by the learned Arbitrators at their convenience.

10. The arbitrators shall be paid fee in accordance with the Fourth Schedule of the Act, as amended.

11. The arbitrators are requested to complete the proceedings as per time limit specified under Section 29-A of the Act.

12. Needless to mention that all the questions arising between the parties in this matter shall remain open for determination in the arbitral proceedings and any observation made hereinabove will not be binding on



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the learned Arbitrators.

13. Petition is disposed of.

14. Copy of the order be sent to the learned arbitrators.

20.05.2024

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**(SUVIR SEHGAL)
JUDGE**

Whether Speaking/Reasoned	Yes/No
Whether Reportable	Yes/No