

## Rites Ltd. Vs Apex Construction Company Through Its Managing Director & Anr

**Court:** Delhi High Court

**Date of Decision:** Jan. 6, 2022

**Acts Referred:** Arbitration And Conciliation Act, 1996 " Section 2(1)(f), 11, 11(9), 34, 37

**Hon'ble Judges:** Vibhu Bakhru, J

**Bench:** Single Bench

**Advocate:** G. S. Chaturvedi, Kunwar Chandresh, Nupur Agrawal

**Final Decision:** Disposed Of

### Judgement

Vibhu Bakhru, J

1. The petitioner (hereafter "RITES") has filed the present petition under Section 34 of the Arbitration & Conciliation Act, 1996 (hereafter

"the A&C Act"), inter alia, impugning the orders dated 28.09.2019 and 20.12.2019 passed by the Arbitral Tribunal.

2. By the order dated 28.09.2019, the Arbitral Tribunal noted that RITES was also a Power of Attorney holder of Delhi Police (respondent no.2) and

held that since it had, acting as an agent of respondent no. 2, proceeded with the defence in arbitration without the independent participation of

respondent no.2, it could not insist on separate participation by respondent no.2. Further, the Arbitral Tribunal also observed that participation of

respondent no. 2 was optional. The Arbitral Tribunal directed the parties to submit the claims and counter-claims by 08.10.2019.

3. By the impugned order dated 20.12.2019, the Arbitral Tribunal rejected the application of RITES to separately implead respondent no.2 principally

on two grounds. First, that the reference required the Arbitral Tribunal to decide the disputes between respondent no.1 and RITES, which was

defending the claims on behalf of respondent no. 2. And second, that RITES had also proceeded with submitting the Statement of Defence;

submission of counter-claims; acceptance and denial of documents; and submission of draft issues.

4. Mr. Chaturvedi, learned counsel appearing for RITES, states that the said order is required to be treated as an interim award and therefore, is

amenable to challenge under Section 34 of the A&C Act.

5. The learned counsels for the respondents contest the same and submit that the order passed by the Arbitral Tribunal is merely an order and cannot

be construed as an arbitral award (either final or interim).

#### Factual Context

6. RITES had floated a tender in the month of September, 2011 inviting offers for construction of Delhi Police Housing at Sector 11, Rohini, Delhi.

According to RITES, it had done so on behalf of respondent no.2.

7. On 30.09.2011, respondent no.1 (hereafter "Apex") submitted its tender, which was opened on 27.01.2012. Subsequently, by a Letter of

Acceptance dated 28.02.2012, RITES accepted the bid submitted by Apex. It claims that it did so as an agent / Power of Attorney holder of

respondent no.2. RITES and Apex entered into an Agreement dated 16.04.2012 for execution of the said works (hereafter "the

Agreement"). The opening paragraph of the Agreement indicates that RITES had entered into the Agreement "acting for and on behalf of and

as an Agent / Power of Attorney Holder of Delhi Police, Delhi". Delhi Police (respondent no.2) was referred to as the "Employer".

8. The Conditions of Contract as applicable to the Agreement includes an arbitration clause. The relevant extract of the Arbitration Clause is set out

below:

"CLAUSE 25

#### Settlement of Disputes & Arbitration

Except where otherwise provided in the Contract all questions and disputes relating to the meaning of the specifications, design, drawings and

instructions hereinbefore mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right matter

or thing whatsoever in any way arising out of or relating to the Contract, designs, drawings, specifications, estimates, instructions, orders or these

conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after

the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:

1) If the Contractor considers any work demanded of him to be outside the requirements of the Contract or disputes any drawings, record or decision

given in writing by the Engineer on any matter in connection with or arising out of the Contract or carrying out of the work to be unacceptable, he shall

promptly within 15 days request the Engineer-in-Charge in writing for written instruction or decision. Thereupon, the Engineer-in-Charge shall give his

written instructions or decision within a period of one month from the receipt of the Contractor's letter.

If the Engineer-in-Charge fails to give his instructions or decision in writing within the aforesaid period or if the Contractor is dissatisfied with the

Instructions or decision of the Engineer-in-Charge, the contractor may, within 15 days of the receipt of the Engineer-in-Charge decision, appeal to the

Appellate Authority specified in Schedule A, who shall afford an opportunity to the Contractor to be heard, if the latter so desires, and to offer

evidence in support of his appeal. The Appellate Authority shall give his decision within 30 days of receipt of Contractor's appeal. If the

Contractor is dissatisfied with this decision, the Contractor shall within a period of 30 days from receipt of the decision, give notice to the Accepting

Authority specified in Schedule A for appointment of arbitrator failing which the said decision shall be final binding and conclusive and liable to

adjudication by the Arbitrator.

2) Except where the decision has become final, binding and conclusive in terms of Sub Para (1) above, disputes or difference shall be referred for

adjudication through arbitration by a sole arbitrator appointed by the Accepting Authority. The selection of Arbitrator by the Accepting Authority will

be governed by the fact whether the dispute is (i) between two Public Sector Enterprises or (ii) between a Public Sector Enterprise and a Government

Department or (iii) Otherwise.

In case the disputes does not fall under item (i) or (ii) of this Para the Accepting Authority, shall appoint the sole Arbitrator within 30 days of receipt

of notice from the Contractor to refer the dispute for Arbitration, the Accepting Authority stipulated in Schedule F shall send to the Contractor a list of

three serving officers of RITES of appropriate status depending on the total value of claim, who have not been connected with the work under the

Contract. The Contractor shall, within 15 days of receipt of this list select and communicate to the Accepting Authority, the name of one officer from

the list who shall then be appointed as the Sole Arbitrator. If the Contractor fails to communicate his selection of name within the stipulated period, the

Accepting Authority shall without delay, select one officer from the list and appoint him as the Sole Arbitrator.

\*\*\*\* \*  
\*\*\*\* \*  
\*\*\*\* \*

6) Parties to be impleaded in the arbitration proceedings.

In case of any claims by the Contractor, the Employer as well as RITES Ltd acting as Agent to the Employer will implead themselves as parties to the

Arbitration Proceedings.

9. By a letter dated 03.06.2019, Apex invoked the Arbitration Clause and requested the Executive Director (The Accepting Authority) to appoint an

arbitrator.

10. By a letter dated 01.07.2019, RITES forwarded the names of all persons on its panel to Apex and by a letter dated 03.07.2019, Apex chose Mr

Arvind Kumar Arora to be appointed as the Arbitrator. Accordingly, by a letter dated 11.07.2019, RITES appointed Mr Arvind Kumar Arora as the

Sole Arbitrator to decide and make his award regarding claims/disputes by the contractor as well as counterclaims of RITES, if any, arising out

of the same contract.

11. On 24.09.2019, RITES made a representation to the Arbitral Tribunal to implead Delhi Police (respondent no.2), which was rejected by the

impugned order dated 28.09.2019.

12. Thereafter, RITES informed respondent no. 2 about the progress of the arbitration and requested for legal fees for pursuing the proceedings,

which was declined by respondent no. 2.

13. On 19.12.2019, RITES made another application to the Arbitral Tribunal for impleading Delhi Police (respondent no. 2), which was rejected by the

impugned order dated 20.12.2019.

14. Aggrieved by the same, RITES has filed the present petition.

#### Reasons and Conclusion

15. It is clear from the Agreement entered into between the parties that RITES had entered into the Agreement with Apex on behalf of Delhi Police

(respondent no.2) as its Power of Attorney Holder. A copy of the Power of Attorney has also been placed on record.

16. This Court in RPP Constructions (P) Ltd. v. RITES Ltd.: 2017 SCC OnLine Del 6464 has considered a similar controversy, whether an Employer

was required to be made a party to the arbitral proceedings. The relevant extract of the said decision is set out below:

“16. At the outset it is necessary to note that the tenders were invited by RITES on behalf of Sri Lankan Railways. The opening words of the

notice inviting tenders clearly indicated that tenders were invited by RITES LIMITED for and on behalf of SRI LANKA RAILWAYS. The

LOA dated 08.02.2010 also clearly indicated that RIPL's tender had been accepted by the Competent Authority of RITES LIMITED in its

capacity as an Agent/Power of Attorney Holder acting for and on behalf of Sri Lankan Railway.

17. The Agreement also clearly stated that the agreement was entered into by RITES for and on behalf of Sri Lankan Railways who was referred to

as the “employer”. The opening paragraph of the Agreement which describes the parties thereto reads as under:-

“THIS AGREEMENT is made on 7th day of May Two thousand Ten between RITES Ltd. a Government of India Enterprise and a Company

registered under Companies Act, 1856 having its registered office at SCOPE Minar, Laxmi Nagar, (Delhi) and its Corporate Office at

MITES BHAWAN, Plot No.1, Sector 29, Gurgaon (Haryana) representing through General Manager, MITES LIMITED for and on behalf of Sri

Lankan Railways hereinafter called the Employer (which expression shall, wherever the context so demands or requires, include their successors in

office and assigns) on one part and M/s R. P. P. Constructions (P) Ltd., P&C Tower, 3rd floor No.140, Perundurai Road, Erode-638011, Tamil Nadu,

India hereinafter called the Contractor (which expression shall wherever the context so demands or requires, include his/their successors and assigns)

of the other part.~çâ,~â€

18. The Agreement was also signed by MITES ~çâ,~â€in the capacity of Agent and Power of Attorney Holder for and on behalf of Sri Lankan Railways

(The Employer)~çâ,~â€. It is apparent from the above that MITES was not a party to the Agreement and the Agreement was only between RIPL and Sri

Lankan Railways. Although, MITES had a significant role to play in the execution of the works, the same was only in its capacity as an Agent and a

Power of Attorney Holder of Sri Lankan Railways.

\*\*\*\* \*\*\*\* \*\*\*\*

29. It is not RIPLâ€™s case that there is no privity of contract with Sri Lankan Railways. Clearly, the Agreement is between RIPL and Sri Lankan

Railways albeit acting through MITES.

30. Having stated above, at this stage, the only limited question to be examined is whether Sri Lankan Railways is a necessary party to the arbitration.

In my view, the express terms of sub clause (6) of Clause 25 of GCC clinches the issue; it expressly provides that MITES acting as an Agent to the

Employer as well as the Employer will implead themselves as parties to the arbitration proceedings. In view of this express clause, it is no longer open

for RIPL to contend that Sri Lankan Railways is not a necessary party to the disputes sought to be referred to arbitration. Thus, plainly, the arbitration

would fall within the definition of ~çâ,~â€International Commercial Arbitration~çâ,~â€ as given in Section 2(1)(f) of the Act and, therefore, by virtue of 11(9) of

the Act, an application for appointment of an Arbitrator can only be made to the Supreme Court and not this Court.~çâ,~â€

17. The observations made by this Court in the aforesaid decision are also clearly applicable in the facts of the present case. However, it is material to

note that the said decision was rendered in a petition filed under Section 11 of the A&C Act.

18. Having stated the above, this Court is also of the view that the present petition is not maintainable as the impugned orders are not arbitral awards.

The Arbitral Tribunal has merely rejected the application of MITES seeking impleadment of respondent no.2 as the same was beyond the terms of

reference.

19. The Arbitral Tribunal may not have the jurisdiction to suo motu implead any party to the arbitral proceedings. As noted above, the learned Sole

Arbitrator was appointed by RITES to adjudicate the "claims/disputes by the contractor as well as counterclaims of RITES". The Arbitral

Tribunal had noted that RITES had proceeded with the arbitration.

20. It is also open for any of the parties to seek appointment of an arbitrator for adjudication of disputes between the parties if a party is not willing to

concur on the appointment of a sole arbitrator. However, once the arbitrator is appointed, he is bound by the reference and it is not permissible for him

to go beyond the same.

21. Mr. Chaturvedi, referred to the decision of a Coordinate Bench of this Court in *HLS Asia Limited v. Geopetrol International Inc. & Ors.*: 2012

SCC OnLine Del 5833, in support of his contention that an order rejecting the application of RITES for impleadment of respondent no.2 would be an

interim award. The said contention is unpersuasive. The decision in *HLS Asia Limited v. Geopetrol International Inc. & Ors.* (supra) was rendered in

an appeal under Section 37 of the A&C Act against an order dated 29.05.2012. More importantly, in that case, the arbitral tribunal had accepted the

application of NTPC Ltd. "one of the parties to the arbitral proceedings" to be deleted as a party to the arbitral proceedings. The import of that

order was clearly the termination of the claim against NTPC. This would be a final decision and would amount to rejecting the claim made by the

claimant against NTPC.

22. In the present case, the decision of the Arbitral Tribunal to not implead respondent no.2 as a party does not in any manner terminate the claim

against respondent no.2. It is the case of RITES that it is defending the arbitral proceedings on behalf of respondent no.2 and the Arbitrator has

accepted the same. Respondent no. 2 has not challenged the decision of the Arbitral Tribunal to accept RITES as its agent.

23. In view of the above, the present petition is disposed of. It is clarified that RITES as well as Apex would be well within their rights to seek

appropriate remedies to include respondent no.2 as a party independent of RITES.

24. The petition is accordingly, disposed of.