
(2017) 12 GAU CK 0008

GAUHATI HIGH COURT

Case No: 18 of 2017

M/s Bikash Enterprises

APPELLANT

Vs

Union of India & Ors

RESPONDENT

Date of Decision: Dec. 4, 2017

Acts Referred:

- Arbitration and Conciliation Act, 1996, Section 11(6) -
- Arbitration and Conciliation (Amendment) Act, 2015, Section 12(5), Section 31(5), Section 31A(5)

Hon'ble Judges: Arup Kumar Goswami

Bench: SINGLE BENCH

Advocate: R. Hussain, D. K. Dey

Judgement

1. Heard Mr. R. Hussain, learned counsel for the petitioner. Also heard Mr. D.K. Dey, learned standing counsel, Railways appearing for the respondents.

2. The petitioner was awarded a work of RNY-Construction of 30 units standard type-III Quarter (Double Storied) at an approximate value of Rs. 2,61,88,677/- and a contract agreement being number D120090025 dated 3.3.2010 was executed by and between the petitioner and the respondent. The said agreement at Clause 5 provides for arbitration and settlement of disputes in terms of Clause 64 (wrongly recorded as 63) of the General Conditions of Contract, NF Railway, 1998.

3. It is not disputed by the learned counsel for the parties that in the instant case, Clause 64(3)(a)(ii) will apply and that the arbitral tribunal shall consist of a panel of three Gazetted Railway Officers not below JA grade as the arbitrators. The aforesaid Clause also provides for the mechanism by which the aforesaid arbitrators are to be appointed.

4. As the Railways did not make payment of some dues to the petitioner, the petitioner lodged its final claim claiming a sum of Rs. 1,88,70,381.21 under different heads (Annexure-3 of this petition), which was disputed by the Railways by letter dated 25.8.2016 (Annexure-4). Thereafter, the petitioner invoked arbitration clause by its notice dated 13.1.2017 (Annexure-5). The respondent vide letter dated 17.2.2017 (Annexure-6) indicated that action is being taken for appointment of arbitrator as per terms and conditions of the contract.

5. Subsequently, by letter dated 10.4.2017 (Annexure-7) the Deputy Chief Engineer/WD requested the petitioner to sign an agreement to waive of the provisions of Section 12(5) and Section 31(5) of the Arbitration and Conciliation (Amendment) Act, 2015 in order to appoint arbitrator under Clause 64 of the General Conditions of Contract.

6. The petitioner declined to execute the agreement and thereafter, filed this application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (for short, 'the Act') for appointment of arbitrator.

7. In the written objection filed, the Railways had contested the claim of demand made by the petitioner. Placing reliance on the affidavit filed and, more particularly, referring to the No Claim Certificate (NOC) at Annexure-B, given by the petitioner, it is submitted by Mr. Dey that the claim is not arbitrable.

8. If the claim was not arbitrable, it is not understood why the Railways had written letter dated 10.4.2017 for signing the agreement for waiving of the provision of Section 12(5) and Section 31(5) of the Act.

9. In paragraph 6 of the affidavit, it is stated that the dues can be cleared only after receiving unconditional and unequivocal NOC. In the case of *Ambika Constructions vs. Union of India*, reported in (2006) 13 SCC 475, which is also a case involving Railways, the Supreme Court had held that notwithstanding Clause 43(2) of the General Conditions of Contract and the submission of an unequivocal NOC by the appellant, the appellant was entitled to claim a reference under the contract for arbitration.

10. Section 12(5) was inserted in the Act by Arbitration and Conciliation (Amendment) Act, 2015 with effect from 23.10.2015. It reads as under:

"Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel of the subject and matter of the dispute, falls under any of the categories specified in the 7th schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to the disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."

11. Item 1 of the 7th Schedule of the Act reads as follows:

"1. An arbitrator is an employee, consultant, advisor or has any other past or present business relationship with the party."

12. Under Clause 64(3)(a)(ii) of the General Conditions of Contract, as was noticed earlier, Arbitral Tribunal is to consist of a panel of three gazetted Railways officers and therefore, in view of Section 12(5) of the Act read with Item No. 1 of the 7th Schedule of the Act, the employees of the Railways will be ineligible to be appointed as arbitrator and this was the reason why the Railways had requested the petitioner to sign the agreement to waive of the provision of Section 12(5). Section 31(5), which was also referred to in the letter dated 10.04.2017 (Annexure-7), seems to be not at all connected with the issue as it provides that after the arbitral award is made, a signed copy shall be delivered to each party and, perhaps, reference was sought to be made to Section 31A(5), which reads as follows:

"An agreement which has the effect that a party has to pay the whole or part of the costs of the arbitration in any event shall be only valid if such agreement is made after the dispute in question has arisen."

13. Admittedly, Clause 64.6 of the General Conditions of Contract provides that the cost of arbitration shall be borne by the respective parties.

14. Since the petitioner did not agree for waiver of Section 12(5) of the Act, the respondent has no right to appoint arbitrator from amongst its officers.

15. In view of the above, Hon^{ble} Mr. Justice H. N. Sarma, a former Judge of the Gauhati High Court, is appointed as the Arbitrator.

16. Registry will send a copy of this order to Hon^{ble} Mr. Justice H. N. Sarma (Retd.).