



GAHC010191342022

Page No.# 1/10



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

Case No. : Arb.P./26/2022

R L CONSTRUCTION

A PROPRIETORSHIP FIRM, HAVING ITS OFFICE AT BASUDEV COMPLEX,
2ND FLOOR, SHILLONGPATY, SILCHAR- 788001 AND IS REPRESENTED BY
ITS PROPRIETOR SHRI MUKUL PAUL, RESIDENT OF CHENCOORI ROAD,
SILCHAR- 788001 IN THE DISTRICT OF CACHAR, ASSAM.

VERSUS

NORTH EAST FRONTIER RAILWAY (CONSRUCTION ORGANIZATION) AND
ANR
REPRESENTED BY THE GENERAL MANAGER/ CONSTRUCTION,
MALIGAON, GUWAHATI- 781011, KAMRUP(M), ASSAM.

2:THE CHIEF ENGINEER/ CONSTRUCTION-II
NORTHEAST FRONTIER RAILWAY (CONSTRUCTION ORGANIZATION)
MALIGAON
GUWAHATI- 781011
KAMRUP(M)
ASSAM

Advocate for the Petitioner : MR G N SAHEWALLA

Advocate for the Respondent : ASSTT.S.G.I.

BEFORE
THE HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Appellant

:Mr. GN Sahewalla, Sr. Advocate



Mr. M Sahewalla, Advocate

For the Respondents : Ms. B Sarma,CGC
Date of Hearing : 13.12.2023
Date of Judgement : 08.02.2024

JUDGEMENT & ORDER (CAV)

Heard Mr. GN Sahewalla, learned Senior counsel assisted by Mr. M Sahewalla, learned counsel for the petitioner. Also heard Ms. B Sarma, learned CGC.

2. The present application is filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996. The background fact of the present case can be summarised as follows:

I. Pursuant to a tender process issued by the respondent Railways for execution of work "construction of Sub-structure over pile foundation for major bridges No. 37 (24.4 X 3 Composite Girder) at Ch.13.831 km & Construction of ROB No. 18 at Km 6.1 (Span 1X8.7 m RCC Box), including other ancillary works in between stations Bairabi and Sairang in connection with the construction of new BG Railway Line from Bairabi to Sairang (Mizoram)", on 01.03.2019 a letter of acceptance was issued by the Railways.

II. Accordingly, a contract was executed into between the parties on 10.01.2020.

III. Subsequently, a dispute regarding the progress of the work was raised by the respondent Railways and accordingly on 10.03.2021, a 7 days notice under Clause 20 of Standard General Condition of contract was issued asking the petitioner to commence the work/ to make good the progress work. It was further provided in the said notice that on failing to adhere to the demand on expiry of the 7 days period the



contract will be rescinded and the contract work under the contract will be carried out independently without the participation of the petitioner and it was further proposed in the event of failure, the security deposit shall be forfeited.

III. On 09.03.2020, the Railways advised the petitioner to extend the contract as contract was supposed to expire on 30.04.2020 and it was further advised to submit an application with proper justification for consideration of the extension.

IV. Subsequently, by an order dated 30.04.2020, an extension for completion of the work was granted up to 31.03.2021.

V. Thereafter, by another communication dated 23.07.2020, the Railways instructed the petitioner to apply for work permit to the Government of Mizoram through the Office of the Railway so as to facilitate movement of the staff and labour at Mizoram from outside. Such communication reflects that in the meantime, the ongoing construction in Bairabi Sairang project has been hampered due to Covid-19 and subsequent lockdown.

VI. Thereafter, by a communication dated 09.03.2021, the petitioner issued a communication to the respondent for foreclosure of the works due to applicability of force majeure under Clause 17 of the GCC, in view of Covid-19 pandemic and the border unrest between Assam and Mizoram and abnormal increase in materials and labour cost in connection with the work.

VII. Accordingly, a prayer was made for foreclosure of the work under Clause 17 of the GCC sympathetically without risk and cost.

VIII. Thereafter, by a communication dated 01.03.2021, the Railways issued a notice under Clause 62 of the GCC to start the work.

IX. Subsequently, on 10.03.2021 alleging that the petitioner could not



start the work within the demanded period of 7 days under the notice dated 01.03.2021, a notice of 48 hours in terms of Clause 62 of GCC was issued to the petitioner to commence the work.

X. Subsequently, by yet another communication dated 15.03.2021, the contract was rescinded in terms of Clause 62 of the GCC in view of the failure of the petitioner to resume work even after the 48 hours notice and a decision was taken by the Railways that the contract will be carried out independently without participation of the petitioner and the petitioner as an individual or a partnership firm / JV was debarred from participating in the tender process for execution of the balance work and it was further decided to forfeit the security deposit and performance guarantee.

XI. Thereafter, an application under Section 9 of the Arbitration and Conciliation Act, 1996 was preferred by the petitioner, which was registered as Misc Arbitration Case No. 13/2021.

XII. The learned trial court granted a status quo by its order dated 16.03.2021 as an interim measure.

XIII. Thereafter, in terms of Clause 63 of the GCC, the petitioner raised a claim on 25.03.2021.

XIV. Thereafter, on 03.03.2022, the petitioner issued a notice under Section 21 of the Arbitration and Conciliation Act, 1996 read with Clause 64 (1)(I) of GCC to adjudicate the dispute in relation to the contract dated 10.01.2020. When no arbitrator was appointed, the present application was filed.

3. Mr. GN Sahewalla, learned Senior counsel submits that the petitioner has invoked Clause 17 of the GCC by its communication dated 18.02.2021. However, without giving any reply to the petitioner, the respondent authorities have issued 7 days notice. Mr. Sahewalla further submits that in reply to such notice

the petitioner again requested the respondents for foreclosure of the contract. But the respondent without furnishing a proper reply to the petitioner issued a 48 hours' notice. Mr. Sahewalla contends that the respondent thereafter terminated the contract by the communication dated 12.03.2021 and finding no alternative, the petitioner invoked Clause 63 of the GCC with a representation dated 25.03.2021 along with the claim of the petitioner to the respondent authorities. It is further submitted by Mr. Sahewalla that the outer limit for making a decision by the respondent on such representation is 120 days as provided under Clause 63 of the GCC but the petitioner is yet to receive any reply. Mr. Sahewalla finally submits that the petitioner thereafter invoked Clause 64 of the GCC as the respondent failed to communicate any reply to the petitioner within 120 days. Thereafter, the petitioner preferred the present application under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of an independent and impartial arbitrator to adjudicate the disputes as raised in this application.

4. Per contra, Ms. B Sarma, learned counsel appearing for the respondent NF Railways argues the followings:

I. As per clause 63.I of the contract, all disputes and differences of any kind what so ever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract, shall be referred by the contractor to the General Manager and the General Manager shall, within 120 days after receipt of contractor's representation, notify the decisions on all matters referred by contractor in writing. However, such arbitration clause shall not be applicable to certain clauses of Standard General Conditions of contract or special conditions of the contract, which are exclusively treated as excepted matter (matter not arbitrable) and decision of the Railway Authority



thereon shall be final and binding on the contractor. Amongst others, the clause 62(1) of the Standard General Conditions of contract i.e. determination of the contract owing to default of the contractor more particularly sub-clause 6 i.e. abandonment of the contract and secondly persistently disregard of instructions of the Engineer are excepted matter under clause 63.I of the contract agreement. Such excepted matters are non-arbitrable in terms of clause 64.(1) of the contract agreement.

II. She argues that the contract was abandoned by the contractor, which is clearly established from the communication dated 09.03.2021. Therefore, it is clear that the contract has been abandoned by the petitioner and the contract was to be determined owing to default of the contractor inasmuch as even after issuance of notices issued the contractor could not start the work. Thus, the contractor persistently disregarded the instructions of the engineer to start the execution of the work. That being the position in term of clause 62(1) of the Standard General Condition of the contract the dispute is not arbitrable in terms of Clause 64.I(i) of the contract agreement as determination of contract took place owing to default of the contractor abandonment of the contract and persistent disregard of the instruction of the engineer. Therefore, present application under Section 11 is not maintainable.

II. It is the further argument of the learned counsel for the Railways that clause 10 of the contract agreement prescribed that provisions of clause 16 and 63 of the contract agreement shall prevail over the clause 63 and 64 of the general conditions of the contract and for this reason also the dispute is non-arbitrable.

III. The learned counsel for the railway advanced argument on the merit of the dispute raised by the petitioner inasmuch as it is her case that the contract was to be terminated for the fault of the contractor and

not for any fault of the Railways. Countering such argument, Mr. Sahewalla, learned Senior counsel submits that this court while determining an application under Section 11 of the Act to limit is jurisdiction to the examination of existence of an arbitration, nothing more nothing less, not to say about entering into the merit whether the contract was terminated or it was abundant.

5. I have given anxious consideration to the argument advanced by the learned counsel for the parties, perused the general condition of the contract. The respondents have not disputed the existence of the arbitration clause. It has not also disputed the existence of the contract entered into between the respondents and the petitioner herein. It has also not raised any dispute regarding the petitioner's privity to the contract in question. Under Section 11 (6a) of the Arbitration and Conciliation Act, while exercising referral jurisdiction, the Referral Court would be required to limit itself to the examination of existence of an arbitration agreement. In the case of ***Duro Felguera, S.A. vs. Gangavaram Port Limited*** Hon'ble Apex Court reported in **(2017) 9 SCC 729** held that by virtue of insertion of Section 11(6a), the referral jurisdiction of a court is limited to examining whether an arbitration agreement exists between the parties-nothing more, nothing less.

6. Law is also equally well settled that at a referral stage, a prima-facie review is required to be taken to weed out manifestly and ex-facie nonexistent and invalid arbitration agreement and non arbitrable dispute. In the case of ***NTPC Limited vs M/S SPML Infra Limited*** reported in **2023 (2) Arb LR 213 (SC)** the Hon'ble Apex court propounded that at the referral stage a referral court must undertake two enquiries. The primary enquiry pertains to existence and validity of an arbitration agreement which includes an enquiry as to the parties to the agreement and applicant's privity to the said agreement. In the case in hand, neither the existence and the validity of the arbitration

agreement is disputed by the respondents nor the petitioner's privity to the said agreement is an issue. What is in dispute is the non-arbitrability of the dispute. Law is equally well settled that the secondary enquiry in respect of non-arbitrability of the dispute is preferably to be determined and decided by the arbitral tribunal at its first instance and only in exceptional cases the Referral Court should reject reference more particularly when claims are manifestly and ex-facie non-arbitrable.

7. In the case in hand, certain facts as discussed hereinabove are not in dispute. Clause 63.I of the contract agreement provides the arbitration clause. Such clause is quoted hereinbelow:

“Clause 63.I Matters finally determined by the Railway. All disputes and differences of any kind whatsoever arising out of in connection with the contract whether during the progress of the work or after its completion and whether before or after the determination of the contract shall be referred by the contractor to the GM and the GM shall within 120 days after receipt of contractor's representation make and notify decision on all matters referred to by the contractor in writing provided that matters for which provision has been made in clauses 8,18, 22(5), 39, 43 (2), 45(a), 55-A(5), 57, 57A, 61(1), 61(2) and 62 (1) of Standard General Conditions of contract or in any clause of the Special Condition of the contract shall be deemed as 'excepted matters' (matters not arbitrable) and decision of the Railway Authority, thereon shall be final and binding on the contractor provided further that 'excepted matter' shall stand specifically excluded from the purview of the arbitration clause”

8. From the aforesaid clause, it is seen that clause 62(1) of the Standard General Condition of contract is an excepted matter (matters not arbitrable) and the decision of the railway authorities shall be final in this regard. Clause 62(1) of the Standard General Condition of the contract of Indian Railways explains the determination of contract owing to default of contractor. Sub-clause 6 of Clause 62(1) refers to determination of contract owing to abandonment of the contract by the contractor and sub-clause 6 refers to determination of contract owing to persistent disregard of instruction of Engineer or contravention of any condition of the contract by the contractor. In view of such clauses, i.e. 62.(1) (vi) and (vii) and supported by the communication dated 09.03.2021, whereby



the petitioner/ contractor asked the respondents for foreclosure of the contract by applying Force Majeure clause under Section 17 of the GCC, the respondents claim that the petitioner has abandoned the contract. However, this court in the given fact of the case is of the view that whether the petitioner was entitled to foreclose the contract taking recourse to Force Majeure or whether it is an abandonment of contract is to be determined by the Arbitral Tribunal. The foreclosure of the contract by invoking the Force Majeure cannot be determined to be an abandonment of contract in a referral stage inasmuch as in the aforesaid factual matrix, it cannot be said that in view of the foreclosure of the contract, the arbitration clause has manifestly and ex-facie become non-arbitrable. Similar is the case so far the same relates to clause 62.(1)(vii). It is the contention of the respondent Railways that even after issuance of 7 days notice under clause 20 of the GCC asking the petitioner to commence the work, the petitioner did not start the work and therefore, such an omission on the part of the petitioner is a disregard to the instruction of the respondents. Further, it is the case that Railways even issued a communication dated 01.03.2021 under clause 62 of the GCC to start work and thereafter, 48 hours notice was issued on 01.03.2021 however, all such instructions were disregarded by the petitioner. Such argument also does not find favour of this court for the similar reason inasmuch as the contractor itself raised an issue and justified for inability to continue with the work and relying on Force Majeure clause foreclosed the contract. Such fact cannot lead at the referral stage in absence of any evidence to conclude that such fact has laid the dispute non-arbitrable. This court at this referral stage cannot undertake full review of the contested facts more particularly whether it was a foreclosure or an abandonment or that whether the contractor had disregarded the instruction of the Engineer or it is a sufficient reason to go for foreclosure of the contract. As this court in the backdrop of given facts and material available on record at this referral stage cannot



conclude without any vestige of doubt that the claim is non-arbitrable, the contention of the respondents are accordingly negated.

9. As there is no dispute as regards the existence of the arbitration clause and also no dispute regarding privity of the contract and that the petitioner has demanded arbitration in terms of clause 61(i) of the Contract and the time prescribed under Clause 64(I)(i) has been elapsed and no communication has been made, the present petition stands allowed. While parting with the record, it is made clear that the respondents shall be at liberty to raise the issue of arbitrability of the dispute before the arbitrator

10. Accordingly, with the consent with the parties as expressed by the learned counsel for the parties, Hon'ble Mr. Justice A.K. Goswami, former Chief Justice of Chhattisgarh High Court is proposed to be appointed as the sole arbitrator.

11. Registry to communicate a copy of this judgment and order to the learned Arbitrator and obtain instruction, whether the learned Arbitrator is agreeable to the proposal of this Court and the Registry thereafter shall submit a report before this court.

12. List the matter on 23.02.2024.

JUDGE

Comparing Assistant