IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: January 08, 2021

\+ ARB.P. 420/2020

CONSORTIUM OF AUTOMETERS ALLIANCE LTD. AND CANNY ELEVATORS CO. LTD.

..... Petitioner

Through: Mr.Anirudh Wadhwa, Adv.

versus

CHIEF ELECTRICAL ENGINEER/PLANNING, DELHI METRO RAIL CORPORATION & ORS.

..... Respondents

Through: Mr.Tarun Johri, Adv. for R-1

CORAM:
HON'BLE MR. JUSTICE V. KAMESWAR RAO

J U D G M E N T

V. KAMESWAR RAO, J (ORAL)

1. The present petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 ('Act', for short) with the following prayers:

> *"Therefore, in the light of the facts and circumstances of the present case, and the submissions made in regard thereto, this Hon'ble Court may be pleased to:*
> *a. Declare that Clause 17.9 of the GCC forming part of the said Contract, inasmuch as it provides for appointment of all three arbitrators from a pan el of arbitrators proposed by the Respondent, is void and unenforceable;*
> *b. Take the necessary measure and secure the constitution of an independent and impartial Arbitral Tribunal to adjudicate upon the claims of the Petitioner including inter alia by taking the following*

measures:

I. (a) Recognise the appointment of Justice M.M.S. Bedi (Retd,) as the nominee arbitrator on behalf of the Petitioner, (b) declare that the Respondent has forfeited all its rights to participate in the constitution of the Arbitral Tribunal, and consequently (c) appoint an arbitrator on behalf of the Respondent, which arbitrator along with Justice M.M.S. Bedi (Retd), shall mutually appoint the third (presiding) arbitrator;

II. In the alternative to (i) above, take such other steps or measures as may be necessary to secure the constitution of an independent and impartial Arbitral Tribunal to adjudicate the claims of the Petitioner,

c. Pass such other orders as this Hon'ble Court may deem fit in the interests of justice."

2. The petitioner herein is a Consortium of Autometers Alliance Ltd. and Canny Elevators Co. Ltd. having its office at C-63, Sector 57, Noida (UP)- 201307. The respondent Nos.1,2 and 3 ('Respondent/DMRC', for short) are the Chief Electrical Engineer/Planning, Executive Director (Electrical) and Senior General Manager, Contracts of DMRC respectively.

3. It is the case of the petitioner and so contended by Mr. Anirudh Wadhwa, learned counsel appearing on its behalf that subsequent to issue of a Notice Inviting Tender in September 2012, for design, manufacturing, supply, installation, testing & commissioning of Escalators for Delhi MTRS Project Phase-III, the petitioner participated in the bidding process for the same. Being the successful bidder, Respondent issued a Letter of Acceptance dated April 16, 2013 in favour of the petitioner and thereafter entered into a contract being CE-4 Lot-2 dated May 25,

2013 (‘Contract’, for short).

4. It is submitted by Mr. Wadhwa that the Contract is still operational and the petitioner continues to fulfill its obligations under the same. It is also stated that the petitioner started rendering various services under the Contract and started raising invoices for the concerned services from January 2014.

5. According to him, the Respondent herein made regular and complete payments against the first six invoices raised by the petitioner towards rendering the services under the Contract for a period spanning from January 2014 to February 2015 against invoices bearing Nos.13141534, 14150809, 14151119, 14151120, 14151299 and RI/14-15/644.

6. Dispute and differences arose thereafter when Respondent started deducting certain amounts from the invoices raised from March 2015. It is the case of Mr. Wadhwa that on enquiry as to the reason for such deductions, vide a communication May 19, 2015, the Respondent raised objections against the petitioner for charging Service Tax on the services rendered under the Contract and sought details of the same and its deductions/payments against previous bills etc.

7. It is stated by Mr. Wadhwa that irrespective of various communications exchanged between the parties about the wrongful deductions made by the Respondent, the same was never resolved and approximately Rs.4.30 crores have been illegally withheld by the Respondent.

8. Aggrieved by the inaction in resolving the issue even after repeated follow-ups and the petitioner fulfilling its

obligations, the petitioner was constrained to invoke the Conciliation Procedure as per the two-stage dispute resolution clause of the Contract on January 23, 2020, under Clause 17.6 of the GCC read with Clause 17.7 of the SCC. The said clauses read as under:

> *17.6 Within 60 days of receipt of Notice of Disputes either party shall refer the matter in dispute to conciliation.*
> *Conciliation proceedings shall be initiated within 30 days of one party inviting the other in writing to Conciliation. Conciliation shall commence when the other party accepts in writing this invitation. If the invitation is not accepted then Conciliation shall not take place. If the party initiating conciliation does not receive a reply within 30 days from the date on which he sends the invitation he may elect to treat this as a rejection of the invitation to conciliate and inform the other party accordingly.*
> *xxx xxx xxx*
> *39. Sub-Clause 17.7 Conciliation procedure*
> *Clause 17.7 of GCC is superseded and replaced as under:*
> *For the purpose of conciliation in this contract, the conciliation shall be undertaken by one conciliator selected from panel of conciliators maintained by the employer, who shall be form serving or retired engineers of Government Department, or of Public Sector Undertakings. Out of this panel, a list of three Conciliators shall be sent to the Contractor who shall choose one of them to act as Conciliator and conduct conciliation proceedings in accordance with "The Arbitration and Conciliation Act, 1996", of India.*
> ~~*There will be no objection if conciliator so nominated is a serving employee of DMRC who would be Deputy level officer and above.*~~
> *The Employer and the Contractor shall in good faith cooperate with the Conciliator and, in particular,*

shall endeavour to comply with requests by the Conciliator to submit written materials, provide evidence and attend meetings. Each party may, on his own initiative or at the invitation of the Conciliator, submit to the Conciliator suggestions for the settlement of the dispute.

When it appears to the Conciliator that there exist elements of a settlement which may be acceptable to the parties, he shall formulate the terms of a possible settlement and submit them to the parties for their observations. After receiving the observations of the parties, the Conciliator may reformulate the terms of a possible settlement in the light of such observations.

If the parties reach agreement on a settlement of the dispute, they may draw up and sign a written settlement agreement. If requested by the parties, the Conciliator may draw up, or assist the parties in drawing up, the settlement agreement.

When the parties sign the settlement agreement, it shall be final and binding on the parties and persons claiming under them respectively.

The Conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties.

As far as possible, the conciliation proceedings should be completed within 60 days of the receipt of notice by the Conciliator.

The parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject matter of the conciliation proceedings."

9. No amicable settlement could be reached between the parties under the Conciliation Proceedings held by Sole Conciliator appointed from a panel of three Conciliators provided by the Respondent. Pursuant to its failure, it is submitted, the petitioner initiated Arbitration proceedings in terms of Clause

17.9 of the GCC read with Section 21 of the Act vide arbitration notice dated July 15, 2020 ('Arbitration Notice', for short). Clause 17.9 of the GCC reads as under:

> *"17.9 If the efforts to resolve all or any of the disputes through conciliation fails then such disputes or difference, whatsoever arising between the parties arising out of touching or relating to construction / manufacture, measuring operation or effect of the Contract or the breach thereof shall be referred to Arbitration in accordance with the following provisions:*
>
> *(a) Matters to be arbitrated upon shall be referred to a sole Arbitrator if the total value of the claim is upto Rs.5 million and to a panel of three Arbitrators if total value of claim is more than Rs.5 million. The Employer shall provide a penal of three arbitrators which may also include DMRC officers for the claims upto Rs.5 million and a panel of five Arbitrators which may also include DMRC officers for claims of more than Rs.5 million. The Contractor shall have to choose the sole Arbitrator from the panel of three and / or one Arbitrator from the panel of five in case three Arbitrators to be appointed. The Employer shall also choose one Arbitrator from this panel of five and the two so chosen will choose the third arbitrator from the panel only. The Arbitrator(s) shall be appointed within a period of 30 days from the date of receipt of written notice / demand of appointment of Arbitrator from either party. Neither party shall be limited in the proceedings before such arbitrator(s) to the evidence or arguments put before the Engineer for the purpose of obtaining his decision. No decision given by the Engineer in accordance with the foregoing previsions shall disqualify him from being called as a witness and giving evidence before the arbitrator(s) on any matter, whatsoever, relevant to dispute or difference*

referred to arbitrator/s. The arbitration proceedings shall be held in Delhi only. The language of proceedings; that of documents and communication shall be English.

(b) The Employer at the time of offering the panel of Arbitrator(s) to be appointed as Arbitrator shall also supply the information with regard to the qualification of the said Arbitrator nominated in the panel along with their professional experience, phone nos and addresses to the contractor.

(c) The award of the sole Arbitrator or the award by majority of three Arbitrators as the case may be shall be binding on all parties."

10. It is also stated by Mr. Wadhwa that the said Clause only provides for the appointment of three arbitrators (one to be nominated by each party and the nominated arbitrators to choose the presiding arbitrator) from a panel of five arbitrators provided by the DMRC. This according to the him is unworkable and inoperative in view of the amendments to the Act vide the Arbitration and Conciliation (Amendment) Act, 2015 ('Amendment of 2015', for short) and various subsequent judicial pronouncements relating to the independence and impartiality of the arbitral process / the appointment of the arbitrators as prescribed under the said Clause.

11. It is further stated by Mr. Wadhwa that the petitioner vide its Arbitration Notice appointed Justice M.M.S. Bedi (Retd.) as its nominee arbitrator, requesting the Respondent to either agree to his appointment as the sole arbitrator or appoint its nominee arbitrator so that both the nominee arbitrators may appoint the presiding arbitrator and the arbitration proceedings may be

initiated at the earliest. The Arbitration Notice also stated that if the Respondent failed to respond within the prescribed period of the time, the petitioner would be constrained to approach this Court in terms of Section 11.

12. The Respondent in response to the Arbitration Notice vide communication dated July 30, 2020 stated that the appointment of Justice M.M.S Bedi (Retd.) as the sole arbitrator or as the nominee of the petitioner is not acceptable as his name does not appear in the panel of arbitrators of the Respondent and that in terms of Clause 17.9 of the GCC, the petitioner is required to nominate an arbitrator out of a panel of five arbitrators provided by the Respondent. The Respondent also provided the petitioner with a panel of five arbitrators to nominate one from the same.

13. Subsequent thereto, it is stated by Mr. Wadhwa that the petitioner reiterated its stand in terms of Clause 17.9 and its unworkability vide communication dated August 06, 2020 as a response to the above communications.

14. The Respondent also vide letter dated August 19, 2020 in response to the petitioner's communication, according to Mr. Wadhwa, reiterated its arbitrary and illegitimate demand to appoint all three arbitrators from the panel of five arbitrators proposed by the Respondent.

15. Therefore, it is the case of the petitioner and vehemently contended by Mr. Wadhwa that the Respondent having failed to appoint its nominee arbitrator within thirty days from the receipt of the Notice, the petitioner is entitled to the relief as prayed for

under Section 11(6) of the Act.

16. A reply to the petition was duly filed by the Respondent (DMRC). Preliminary objections as to the maintainability of the petition has been raised by the Respondent stating that (i) there is no failure of the procedure agreed to between the parties as envisaged under clause 17 of the Contract; and (ii) the petitioner has failed to place on record any Board Resolution issued by their consortium partner in favour of the signatory to the petition authorizing him.

17. It is the case of the Respondent in its reply and so contended by Mr. Tarun Johri, learned Counsel appearing on its behalf, that pursuant to the issuance of Arbitration Notice by the petitioner, the Respondent had given the panel of five arbitrators vide communication dated July 30, 2020, within a period of 30 days, as envisaged under Clause 17.9 (a) of the GCC and hence, there is no cause of action for the petitioner for filing this present petition. It is also stated by him that there is in fact no failure of the appointment procedure as agreed between the parties requiring interference of this Court under the provisions of the Act.

18. It is stated by Mr. Johri that the petitioner has without any legal justification unilaterally declared Clause 17.9 as unworkable and appointed its nominee as Sole Arbitrator vide the Arbitration Notice and has also asked the Respondent to appoint its nominee arbitrator in case Respondent was not agreeable to the nomination of the sole arbitrator appointed by the petitioner. This, according to him is in complete disregard and violation of

Clause 17.9 of the GCC as the petitioner never even asked the Respondent for providing any panel of arbitrators for constitution of the arbitral tribunal. In other words, it is stated by Mr. Johri that the arbitration clause has not been invoked by the petitioner in terms of the relevant provisions of the Contract / GCC and the Respondent has legally and correctly rejected the appointment of the nominee arbitrator on behalf of the petitioner.

19. Further, it is also stated by him that the initial panel had been provided to the petitioner considering the amount in dispute between the parties which was to the tune of Rs. 4.3 Crores approximately.

20. That apart, it is stated by Mr. Johri that even though the invocation of the arbitration clause by the petitioner was bad and in violation of the procedure agreed between the parties, without prejudice, the Respondent has enclosed a complete broad-based panel of external arbitrators, with its reply, from which the petitioner can exercise the choice of appointing its nominee for adjudication of the disputes. It is also stated that the Respondent would also appoint its nominee from the said panel provided.

21. Due reliance was also placed by him on the Apex Court judgment in ***Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV), 2019 SCC Online SC 1635;*** wherein a similar arbitration clause has been upheld. Even otherwise, it is stated that the initial panel of five arbitrators provided by the Respondent consisted of an Additional District and Sessions Judge (Retd.) and other retired employees from reputed organizations such as RVNL, NHPC etc., who had no

prior professional relationship with the Respondent/DMRC. Therefore, there exists no circumstance under Fifth or Seventh Schedule of the Act which gives any doubt qua independence or impartiality of any individual on the panel.

22. A rejoinder has also been filed by the petitioner. Mr. Wadhwa, as part of his rejoinder submissions once again vehemently submitted that Clause 17.9 is unworkable in view of the Amendment of 2015. He stated that Clause 17.9 as reproduced above was part of the Contract entered into on May 24, 2013 prior to the Amendment of 2015. He also stated that the Apex Court in the judgment of ***Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Limited, (2017) 4 SCC 665,*** has clearly interpreted a *pari materia* clause in the GCC. The arbitration clause in ***Voestalpine Schienen GMBH (supra)*** entitling DMRC, also the respondent therein, to short list a panel of five persons from which a three-member tribunal would be constituted was deleted with by the Apex Court as being violative of the requirement of Section 12 of the Act. In this regard, Mr. Wadhwa has pointed out two adverse consequences as observed by the Apex Court while interpreting the clause therein viz. (i) the limited choice given to the opposite party as it had to choose one out of five names forwarded by the other side; and (ii) the discretion given to DMRC to choose five persons, created a room for suspicion in the mind of the other side that the DMRC may have picked up its own favourites.

23. Mr. Wadhwa stated that the Respondent's continued insistence on a bona fide contractor such as the petitioner to

comply with Clause 17.9 is therefore in willful disregard and contempt of the decision in ***Voestalpine Schienen GMBH (supra)*** directed against the same respondent wherein an identical clause was struck down.

24. He also submitted that even though none of the grounds under Fifth or Seventh Schedule of the Act are attracted for any of the five names proposed by the petitioner, the mere fact that the Respondent had restricted the choice of the petitioner to choose only from five names is sufficient to create justifiable doubts as to the independence and impartiality of the arbitral tribunal created thereto.

25. Further, Mr. Wadhwa sought to distinguish the judgment relied upon by the petitioner in ***Central Organisation for Railway Electrification (supra)*** by stating that the Respondent is attempting to side-step and avoid directly applicable law laid down for it by placing reliance on law laid down in the context of an unrelated organization that is vastly different in size, scope and composition.

26. He also submitted that the purported production of a broad-based panel of arbitrators by the Respondent with its reply to the present petition is belated and impermissible as the same was being produced without prejudice to the stand of Respondent that Clause 17.9 is valid and enforceable. According to Mr. Wadhwa this is nothing but an attempt to correct without suffering consequence of its own unlawful insistence on following the unworkable and inoperative procedure under Clause 17.9 even after repeated communications from the

petitioner intimating the same. In other words, it is his submission that the Respondent, having failed to follow the modified procedure for appointment of a tribunal as per ***Voestalpine Schienen GMBH (supra),*** has forfeited its right to appoint an arbitrator on its behalf.

27. That apart, Mr. Wadhwa also submitted that the panel produced by the Respondent in any event is not broad based. According to him, the Apex Court in ***Voestalpine Schienen GMBH (supra)*** had clearly stated that the panel should consist of (i) engineers of prominence and high repute from the private sector apart from serving or retired engineers of government departments and public sector undertakings; (ii) persons with legal background like Judges and lawyers of repute; and (iii) some disputes may have the dimension of accountancy, etc. and therefore, it would be appropriate to include persons from these field as well. Applying this standard to the present panel produced by the Respondent, it is submitted by him that (i) there are no private sector engineers or accountants in the panel; (ii) there are no lawyers in the panel and; (iii) of the total 51 names provided, there are 26 retired judges, 22 public sector engineers and 3 public sector accountants / finance professionals; and therefore, clearly in failure of the specific directions as laid down in ***Voestalpine Schienen GMBH (supra).***

28. Mr. Wadhwa also placed anchorage on a judgment of this Court in ***SMS Limited v. Rail Vikas Nigam Limited, 2020 SCC Online Del 77,*** wherein it was found by the Court that a panel of 37 names was not sufficiently broad-based for want of private

sector engineers and other professionals such as accountants. Therefore, it is his submission that the panel produced by the Respondent with the reply, apart from being produced belatedly is also non-compliant with specific directions of the Apex Court and is insufficiently broad-based for constitution of a fair, independent and impartial arbitral tribunal and hence, the Court should appoint a nominee arbitrator on behalf of the Respondent and confirm the appointment of petitioner's nominee arbitrator.

29. On the preliminary objection raised by the Respondent that the petitioner has failed to place on record any board resolution issued by their consortium partner in favour of the signatory to the petition authorizing him, it is submitted by Mr. Wadhawa that the same is hyper-technical in nature and the consortium arrangement is duly contained in the Memorandum of Understanding dated October 26, 2012 and May 22, 2013 whereby the 'Lead Member of the Consortium' with a power of attorney from Canny Elevators Co. Ltd. has authorized Autometers Alliance Ltd. to generally represent the petitioner's consortium in all dealings/matters in connection with or relating to or arising out of the petitioner consortium's bid for the project and / or upon award thereof till the expiry of the Contract.

30. Having heard the learned counsels for the parties and perused the record, at the outset, I may state that in substance the challenge in this petition is to Clause 17.9 of the GCC on the ground, it is void and unenforceable as it provides for appointment of all three arbitrators from a panel proposed by the Respondent. The submission was that this process stipulated by

the Respondent fall foul of the judgment of the Supreme Court in ***Voestalpine Schienen GMBH (supra)*** and the judgment of this Court in ***SMS Limited (supra).*** I may also state on the said premise, the petitioner has, *de hors* the provisions of Clause 17.9 of the GCC, proposed the name of Justice M.M.S. Bedi (Retd.) to act as a sole arbitrator or alternatively he be treated as a nominee arbitrator on behalf of the petitioner and had also called upon the Respondent to nominate its arbitrator. Similar is the prayer made in this petition as well. It is not in dispute that the Respondent had prepared a panel consisting of five names. The five names consisted of names of an Additional District and Sessions Judge (Retd.) and other retired employees from reputed organizations such as RVNL, NHPC etc. Whereas in the reply filed by the Respondent, they have taken a stand that they have enlarged/broad-based the list of panel of arbitrators to include the names of 26 retired Judges, 22 public sector engineers (serving / retired) and 3 public sector accountants / finance professionals (serving). In other words, it was submission of Mr. Johri that the Respondent has no objection if the petitioner chooses its nominee arbitrator from the panel of 51 names now prepared by the Respondent.

31. It is also the case of the Respondent; they will choose its nominee arbitrator from the said panel to enable the nominee arbitrators appoint a Presiding Arbitrator.

32. I find most of the arguments of Mr. Wadhwa were on the basis of the panel of five names as existed earlier at the time of the filing of the petition. In view of the constitution of a new

panel by the Respondent, the arguments as put forward by Mr. Wadhwa will not survive. He has also challenged the constitution of the new panel consisting of 51 names by contending that the same is not broad-based being in violation of the judgment of the Supreme Court in ***Voestalpine Schienen GMBH (supra).*** To put it precisely it was his submission that there are no private sector engineers or accountants, lawyers in the panel.

33. There is no dispute that out of the 51 names provided, there are 26 retired Judges, 22 public sector engineers and three public sector accountants / financial professionals. No doubt, the panel do not have persons like lawyers of repute or accountants / financial professionals or engineers from the private sector but the panel consisting of 51 names is ten times the initial panel of five names provided by the Respondent. The dispute between the parties is with regard to the Service Tax. Surely, with 26 retired Judges on the panel and also persons, who are serving / retired from public sector undertakings like Railways / RITES / RVNL other than the respondent Delhi Metro Rail Corporation and it was held by the Supreme Court in ***Voestalpine Schienen GMBH (supra)*** that panel consisting of names of persons, who have retired from other public sector undertakings will not be a ground to challenge it under Section 12(5) of the Act or relevant Schedules therein, this Court is of the view that arguments as advanced by Mr. Wadhwa are not sustainable in the facts of this case. Further, I note that the petitioner has nominated a retired Judge of the High Court as its nominee arbitrator and not a person with finance background. Merely because the Respondent

could have further broad based the panel cannot be a ground to hold that the current panel of 51 names is not broad based when it consists of names of 26 retired High Court / District / Additional District Judges and serving / retired officers of the other Public Sector Undertakings.

34. In fact, the Supreme Court in ***Voestalpine Schienen GMBH (supra)*** has not disapproved the procedure of preparing a panel of arbitrators, for appointing arbitrators to adjudicate the disputes between the parties. The ratio of the judgment of the Supreme Court in ***Voestalpine Schienen GMBH (supra)*** is that a party must have a wider choice for nominating its arbitrator from the panel. I am of the view, the panel now prepared by the Respondent having 51 names is broad based and the petitioner has a wider choice to choose its nominee arbitrator. If the plea of Mr. Wadhwa has to be accepted and the prayers made in the petition are granted, it shall make the panel and the procedure contemplated in the GCC redundant, which is impermissible. I also state that the reliance placed by Mr. Wadhwa on the judgment of ***SMS Ltd. (supra)*** is misplaced. The said judgment is clearly distinguishable as the subsequent panel produced by the respondent therein was clearly not broad-based owing to the presence of only 8 members out of 37 in the panel provided, who were officers retired from organization other than Railways (respondent therein) and Public Sector Undertakings connected with Railways whereas in the panel in hand, the 26 names include retired Additional District Judges / District Judges / High Court Judges.

35. Accordingly, the petitioner is directed to nominate a name from the panel from 51 names prepared by the Respondent, who shall act its nominee arbitrator, within four weeks. Thereafter the parties shall proceed in accordance with the Contract and law.

36. The petition is disposed of.

V. KAMESWAR RAO, J

JANUARY 08, 2021*/aky*