

NORTH EASTERN RAILWAY & ORS.

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v.

TRIPPLE ENGINEERING WORKS

(Civil Appeal No. 6275 of 2014)

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AUGUST 13, 2014.

[RANJAN GOGOI AND M. Y. EQBAL , JJ.]

Arbitration & Conciliation Act, 1996: s.11(6) – Appointment of arbitrator – Contract providing for arbitration by Railway Officers – High Court appointing a retired Chief Justice as the Arbitrator – Held: Although s.11 says that the High Court must appoint arbitrator as per contract between the parties, there is a shift in this notion, in the sense that though the contract between the parties must be adhered to, deviation therefrom in exceptional circumstances is permissible – In the instant case, appointment of retired judge contrary to the agreement requiring appointment of railway officer is valid as the arbitration proceedings did not conclude for two decades since the contractor raised his claims for alleged wrongful termination of the two contracts – The power of the Court under the Act has to be exercised to effectuate the remedy provided thereunder and to facilitate the mechanism contemplated therein – In a situation where the procedure and process under the Act has been rendered futile, the power of the Court to depart from the agreed terms of appointment of arbitrators must be acknowledged – There was no infirmity muchless any illegality or failure of justice can be said to be occasioned by the order passed by the High Court so as to warrant any interference.

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The contracts awarded to the respondent-contractor were terminated and the arbitration proceedings commenced in the year 1996, however the award was still not passed. The contract provided for arbitration by Railway Officers. The High Court appointed a retired Chief Justice as the Arbitrator.

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The question which arose for consideration in the instant

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A appeal was whether the High Court was right in traveling beyond the framework of clause 64(3)(a)(ii) and (iii) of the General conditions of contract and in appointing a retired Chief Justice as arbitrator.

B Dismissing the appeal, the Court

C HELD 1. The provisions of the General Conditions of Contract showed that the panel of arbitrators as per the agreement between the parties necessarily has to be Gazetted Railway Officers; any vacancy in the panel of arbitrators has to be filled up in the same manner in which the initial panel is required to be constituted. [Para 4] [1150-C-D]

D 2. The “classical notion” that the High Court while exercising its power under Section 11 of the Arbitration & Conciliation Act, 1996 must appoint the arbitrator as per the contract between the parties saw a significant erosion in **Ace Pipeline Contracts* case wherein this Court had taken the view that though the contract between the parties must be adhered to, deviations therefrom in exceptional circumstances would be permissible. A more significant development had come in a decision that followed soon thereafter in ***Bharat Battery Manufacturer* case wherein it was held that once an aggrieved party files an application under Section 11(6) of the Act to the High Court, the opposite party would lose its right of appointment of the arbitrator(s) as per the terms of the contract. The implication that the Court would be free to deviate from the terms of the contract is obvious. The apparent dichotomy in **Ace Pipeline Contracts* and ***Bharat Battery Manufacturer* was reconciled by a three judges bench of this Court in ****Northern Railway Administration* where the jurisdiction of the High Court under Section 11(6) of the Act was sought to be emphasized by taking into account the expression “to take the necessary measure” appearing in sub-section (6) of Section 11 and by further laying down that the said expression has to be read

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alongwith the requirement of sub-section (8) of Section 11 of the Act. In *****Singh Builders Syndicate*, the appointment of a retired judge contrary to the agreement requiring appointment of specified officers was held to be valid on the ground that the arbitration proceedings had not concluded for over a decade making a mockery of the process. This Court has suggested therein that the government, statutory authorities and government companies should consider phasing out arbitration clauses providing for appointment of serving officers and encourage professionalism in arbitration. [paras 5, 6] [1150-E-G; 1151-A-C, G; 1152-A-B]

Ace Pipeline Contracts (P) Ltd. Vs. Bharat Petroleum Corporation Ltd. (2007) 5 SCC 304; **Union of India Vs. Bharat Battery Manufacturing Co. (P) Ltd. (2007) 7 SCC 684; *Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Limited (2008) 10 SCC 240; ****Union of India Vs. Singh Builders Syndicate (2009) 4 SCC 523; Punj Lloyd Ltd. Vs. Petronet MHB Ltd. (2006) 2 SCC 638– relied on.*

3. The theory of forfeiture of the rights of a party under the agreement to appoint its arbitrator once the proceedings under Section 11(6) of the Act had commenced came to be even more formally embedded in ******Deep Trading Company* subject, of course, to the provisions of Section 11(8), which provision in any event was held in ****Northern Railway Administration* not to be mandatory, but only embodying a requirement of keeping the same in view at the time of exercise of jurisdiction under Section 11(6) of the Act. [Para 7] [1152-D-E]

*Indian Oil Corporation Limited and Ors. Vs. Raja Transport Private Limited (2009) 8 SCC 520; *****Deep Trading Company Vs. Indian Oil Corporation and Ors.(2013) 4 SCC 35; Datar Switchgears Ltd. Vs. Tata Finance Ltd. (2000) 8 SCC 151 – relied on.*

4. In the instant case, Clauses 64(3)(a)(ii) and (iii) of the General Conditions of Contract did not prescribe any specific

- A qualification of the arbitrators that were to be appointed under the agreement except that they should be railway officers. Even if the arbitration agreement was to specifically provide for any particular qualification(s) of an arbitrator the same would not denude the power of the Court acting under
- B Section 11(6), in an appropriate case to depart therefrom. Admittedly, the award in respect of disputes and differences arising out of the contract was yet to be passed. Though the appellant-Railway in its pleadings made a feeble attempt to contend that the process of arbitration arising out of the said
- C Contract has been finalized, no material, whatsoever was laid before the Court in support thereof. The arbitration proceedings to resolve the disputes and differences arising out of Contract did not even commence. A period of nearly two decades elapsed since the contractor had raised his claims for alleged wrongful termination of the two contracts.
- D The situation is distressing and to say the least disturbing. The power of the Court under the Act has to be exercised to effectuate the remedy provided thereunder and to facilitate the mechanism contemplated therein. In a situation where the procedure and process under the Act has been rendered
- E futile, the power of the Court to depart from the agreed terms of appointment of arbitrators must be acknowledged. There was no infirmity muchless any illegality or failure of justice can be said to be occasioned by the order passed by the High Court so as to warrant any interference. [Para 8] [1152-F-G;
- F 1153-A-E]

Case Law Reference:

	2007(4) SCR 777	Relied on	Para 5
G	2007(8) SCR 993	Relied on	Para 5
	(2006) 2 SCC 638	Relied on	Para 5
	2008(12) SCR 216	Relied on	Para 5
	2009(13) SCR 510	Relied on	Para 5
H	2007(8) SCR 993	Relied on	Para 5

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2009(3) SCR 470	Relied on	Para 6	A
2013 (2) SCR 470	Relied on	Para 6	
(2000) 8 SCC 151	Relied on	Para 6	

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6275 of 2014 **B**

From the Judgment and Order dated 27.06.2012 of the High Court of Patna in request Case No.3 of 2012.

P.S. Patwalia, ASG, Madhrima Tatia, Shreekant N. Terdal for the Appellants. **C**

Sangeeta Singh, Jogendra Singh, Merusagar Samantaray for the Respondents.

The Judgment of the Court was delivered by **D**

RANJAN GOGOI, J. 1. The challenge in this appeal is to order dated 27.06.2012 of the Patna High Court by which a former Chief Justice of the Sikkim High Court had been appointed as the arbitrator to resolve the disputes and differences between the parties to the present proceedings arising out of two contracts bearing No. CAO/CON/722 dated 01.11.1993 and CAO/CON/738 dated 28.04.1994. **E**

2. Both the contracts awarded to the respondent-contractor were terminated on 7.11.1994. Admittedly, the General Conditions of Contract of the Railways, which included an arbitration clause, governed the parties. After the termination of the two contracts the respondent-contractor approached the Patna High Court by means of a writ petition challenging the terminations. The writ petition was dismissed, which dismissal was challenged before this Court in SLP(C) No. 17189/1995. The said special leave petition was also dismissed leaving parties to resolve the differences in an appropriate proceeding i.e. a civil suit or by reference to arbitration, as the case may be. **F**

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A 3. Though a panel of arbitrators as per Clauses 64(3)(a)(ii)
 and (iii) of the General Conditions of Contract was appointed
 as far back as in the year 1996, till date the award(s) in respect
 of the disputes arising out of either of the two contracts is yet
 to be passed. According to the appellant-railways, the
 B proceedings of arbitration has been completed in respect of
 the disputes arising out of Contract No. CAO/CON/722 dated
 01.11.1993. Even if the said statement of the appellant-railways
 is to be accepted, though no material has been laid in support
 thereof, what cannot be denied is the fact that till date the award
 C is yet to be passed. Admittedly, the arbitration in respect of the
 contract No. CAO/CON/738 dated 28.04.1994 has not even
 commenced. This is on account of the fact that in the year 2002
 the North Eastern Railway, which had entered into the contracts
 with the respondent-contractor, was bifurcated into North
 D Eastern Railway and East Central Railway. As the jurisdiction
 in respect of the aforesaid contract No. CAO/CON/738 was to
 be exercised by the East Central Railway it appears that the
 appellant has disclaimed all responsibility with regard to holding
 of arbitration proceedings in respect of the said contract and
 at the same time the East Central Railway has not responded
 E in any positive manner to the several demands for arbitration
 lodged by the contractor.

Insofar as contract No. CAO/CON/722 is concerned,
 naturally, both the parties have tried to lay the blame for the
 F delay in the process of arbitration on each other and the huge
 number of correspondence exchanged in this regard and the
 frequent change of the arbitration panel on account of
 exigencies of service of the panel members (retirement, transfer
 etc.) has made it impossible to pinpoint the responsibility in this
 G regard on any one of the contracting parties. But what is glaring
 is the fact that though the arbitration proceedings in respect of
 the said contract No. CAO/CON/722 had commenced as far
 back as in the year 1996 the award is yet to see the light of
 the day notwithstanding the assertions made by the Union that
 H the proceedings have been completed though as already noted,

no clinching material in this regard has been brought on record; not to speak about the award of the arbitrators though such an award would have been the natural consequence of the completion of arbitration proceedings. It is in the totality of these facts that the High Court had thought it proper to travel beyond the framework of Clauses 64(3)(a)(ii) and (iii) of the General Conditions of Contract and appoint a retired Chief Justice as the arbitrator. A B

4. The correctness of the said decision necessarily has to be judged in the light of the facts and circumstances enumerated above. The necessary legal discourse that would be required to be gone into to answer the question as posed above could begin by extracting the provisions of Clauses 64(3)(a)(ii) and (iii) of the General Conditions of Contract. C

"64(3)(a)(ii) In cases not covered by clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a panel of three Gazette Rly. Officers not below JA grade, as the arbitrators. For this purpose, the Railway will send a panel of more than 3 names of Gazetted Rly. Officers of one or more departments, of the Rly. to the contractor who will be asked to suggest to General Manager up to 2 names out of panel for appointment as contractor's nominee. 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 3 arbitrators so appointed. While nominating the arbitrators it will be necessary to ensure that one of them is from the Accounts department. An officer of Selection Grade of the Accounts department shall be considered of equal status to the officers in SA grade of departments of the Railways for the purpose of appointment of arbitrators. D E F G

64(3)(a)(iii) - If one or more of the arbitrators appointed as above refuses to act as arbitrator, withdraws from his H

A office as arbitrator, or vacates his/their office/offices or is/ are unable or unwilling to perform his functions as arbitrator for any reason whatsoever or dies or in the opinion of the General Manager fails to act without undue delay, the General Manager shall appoint new arbitrator/ arbitrators to act in his/their place in the same manner in which the earlier arbitrator/arbitrators had been appointed. Such re-constituted Tribunal may, at its discretion, proceed with the reference from the stage at which it was left by the previous arbitrator(s)".

C From the provisions of the General Conditions of Contract it is clear that the panel of arbitrators as per the agreement between the parties necessarily has to be Gazetted Railway Officers; any vacancy in the panel of arbitrators has to be filled up in the same manner in which the initial panel is required to be constituted.

5. The "classical notion" that the High Court while exercising its power under Section 11 of the Arbitration & Conciliation Act, 1996 (hereinafter for short 'the Act') must appoint the arbitrator as per the contract between the parties saw a significant erosion in *Ace Pipeline Contracts (P) Ltd. Vs. Bharat Petroleum Corporation Ltd*¹. wherein this Court had taken the view that though the contract between the parties must be adhered to, deviations therefrom in exceptional circumstances would be permissible. A more significant development had come in a decision that followed soon thereafter in *Union of India Vs. Bharat Battery Manufacturing Co. (P) Ltd*². wherein following a three Judges Bench decision in *Punj Lloyd Ltd. Vs. Petronet MHB Ltd*³. it was held that once an aggrieved party files an application under Section 11(6) of the Act to the High Court, the opposite party would lose its right of appointment of the arbitrator(s) as per the terms of the

1. (2007) 5 SCC 304.

2. (2007) 7 SCC 684.

H 3. (2006) 2 SCC 638.

contract. The implication that the Court would be free to deviate from the terms of the contract is obvious. The apparent dichotomy in *ACE Pipeline* (supra) and *Bharat Battery Manufacturing Co. (P) Ltd.* (supra) was reconciled by a three Judges Bench of this Court in *Northern Railway Administration, Ministry of Railway, New Delhi Vs. Patel Engineering Company Limited*⁴ where the jurisdiction of the High Court under Section 11(6) of the Act was sought to be emphasized by taking into account the expression "to take the necessary measure" appearing in sub-section (6) of Section 11 and by further laying down that the said expression has to be read alongwith the requirement of sub-section (8) of Section 11 of the Act. The position was further clarified in *Indian Oil Corporation Limited and Others Vs. Raja Transport Private Limited*⁵. Paragraph 48 of the report wherein the scope of Section 11 of the Act was summarized may be quoted by reproducing sub-paragraphs (vi) and (vii) herein below.

"(vi) The Chief Justice or his designate while exercising power under sub-section (6) of Section 11 shall endeavour to give effect to the appointment procedure prescribed in the arbitration clause

(vii) If circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else."

6. The above discussion will not be complete without reference to the view of this Court expressed in *Union of India Vs. Singh Builders Syndicate*⁶ wherein the appointment of a

4. (2008) 10 SCC 240.

5. (2009) 8 SCC 520.

6. (2009) 4 SCC 523.

- A retired Judge contrary to the agreement requiring appointment of specified officers was held to be valid on the ground that the arbitration proceedings had not concluded for over a decade making a mockery of the process. In fact, in paragraph 25 of the report in *Singh Builders Syndicate* (supra) this Court had suggested that the government, statutory authorities and government companies should consider phasing out arbitration clauses providing for appointment of serving officers and encourage professionalism in arbitration.

7. A pronouncement of late in *Deep Trading Company Vs. Indian Oil Corporation and Others*⁷ followed the legal position laid down in *Punj Lloyd Ltd.* (supra) which in turn had followed a two Judges Bench decision in *Datar Switchgears Ltd. Vs. Tata Finance Ltd.*⁸. . The theory of forfeiture of the rights of a party under the agreement to appoint its arbitrator once the proceedings under Section 11(6) of the Act had commenced came to be even more formally embedded in *Deep Trading Company* (supra) subject, of course, to the provisions of Section 11(8), which provision in any event, had been held in *Northern Railway Administration* (supra) not to be mandatory, but only embodying a requirement of keeping the same in view at the time of exercise of jurisdiction under Section 11(6) of the Act.

8. In the present case Clauses 64(3)(a)(ii) and (iii) of the General Conditions of Contract do not prescribe any specific qualification of the arbitrators that are to be appointed under the agreement except that they should be railway officers. As already noticed, even if the arbitration agreement was to specifically provide for any particular qualification(s) of an arbitrator the same would not denude the power of the Court acting under Section 11(6), in an appropriate case to depart therefrom. In *Singh Builders Syndicate* (supra) pendency of arbitration proceedings for over a decade was found by this

7. (2013) 4 SCC 35.

H 8. (2000) 8 SCC 151.

Court to be a mockery of the process. In the present case, admittedly the award in respect of disputes and differences arising out of the contract No. CAO/CON/722 is yet to be passed. Though the appellant-Railway has in its pleadings made a feeble attempt to contend that the process of arbitration arising out of the said Contract has been finalized, no material, whatsoever, has been laid before the Court in support thereof. The arbitration proceedings to resolve the disputes and differences arising out of Contract No. CAO/CON/738 has not even commenced. A period of nearly two decades has elapsed since the contractor had raised his claims for alleged wrongful termination of the two contracts. The situation is distressing and to say the least disturbing. The power of the Court under the Act has to be exercised to effectuate the remedy provided thereunder and to facilitate the mechanism contemplated therein. In a situation where the procedure and process under the Act has been rendered futile, the power of the Court to depart from the agreed terms of appointment of arbitrators must be acknowledged in the light of the several decisions noticed by us. We are, therefore, of the view that no infirmity muchless any illegality or failure of justice can be said to be occasioned by the order passed by the High Court so as to warrant any interference. We, therefore, unhesitatingly dismiss this appeal filed by the appellant-railways. However, in the facts of the case we do not deem it appropriate to burden the appellant with any costs.

Devika Gujral

Appeal dismissed.