

**NON-REPORTABLE**

IN THE SUPREME COURT OF INDIA  
CIVIL APPELLATE JURISDICTION  
CIVIL APPEAL NO. 4829 OF 2022

M/s Continental India Private Limited

...Appellant(s)

Versus

General Manager Northern Railway

...Respondent(s)

**J U D G M E N T**

**M.R. SHAH, J.**

1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 15.09.2021 passed by the High Court of Judicature at Allahabad in Arbitration Application No. 15 of 2021, by which, while allowing the application under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the “Act”) filed by the appellant herein – original applicant, the High Court has directed respondent herein to send a fresh panel of four

retired officers in terms of clause 64(3)(b) of the General Conditions of Contract (hereinafter referred to as the “GCC”) and thereafter, the appellant herein – original applicant shall select two from the four suggested names and thereafter the respondent shall constitute the Arbitral Tribunal in terms of clause 64(3)(b) of the GCC, the original applicant has preferred the present appeal.

2. That the appellant and respondent herein entered into a contract/agreement which contains the arbitration clause. As per clause 32 of the agreement, in the event of any question, dispute or difference arising under or in connection with agreement, the same shall be referred to the sole arbitration of a person appointed to be the arbitrator, by the General Manager of the Railway. A request/prayer was made by the appellant herein – original applicant to appoint an arbitrator in terms of clause 32 of the agreement. However, the General Manager/Railway failed to appoint an arbitrator as provided under clause 32 of the agreement. Therefore, the appellant herein – original applicant filed the application before the High Court under Section 11(6) of the Act and requested to appoint a sole

arbitrator. Though, the High Court has observed that the respondent has failed to appoint an arbitrator despite raising the demand of appointing an arbitrator, the application was hence liable to succeed. However, thereafter instead of appointing the sole arbitrator in exercise of powers under Section 11(6) of the Act, the High Court has directed to appoint an arbitrator in terms of clause 64(3)(b) of the GCC. Feeling aggrieved and dissatisfied with the impugned judgment and order passed by the High Court in not appointing the sole arbitrator and instead directing the parties to appoint the arbitrator as per the GCC, the original applicant before the High Court has preferred the present appeal.

3. Shri Ramesh Singh, learned Senior Advocate appearing on behalf of the appellant herein has vehemently submitted that the High Court has committed a serious error in not appointing the sole arbitrator in exercise of powers vested under Section 11(6) of the Act.

- 3.1 It is submitted that the parties to the agreement are governed by the arbitration agreement/clause in terms of the clause 32 of the agreement. It is submitted that despite

invocation of the arbitration clause in terms of the agreement the respondent failed to appoint an arbitrator. It is contended that therefore the respondent forfeited its right to appoint an arbitrator under the agreement and therefore, the High Court was required to appoint a sole arbitrator in exercise of powers under Section 11(6) of the Act. Reliance is placed on the decision of this Court in the case of **Deep Trading Company vs. Indian Oil Corporation and Others; (2013) 4 SCC 35.**

3.2 It is further submitted by Shri Ramesh Singh, learned Senior Advocate appearing on behalf of the appellant – original applicant that the High Court has seriously erred in directing the parties to appoint the arbitrator in terms of clause 64(3)(b) of the GCC.

3.3 It is contended that in the present case the General Conditions of Contract is not applicable at all on the grounds inter-alia that (i) neither the GCC has been signed by the parties nor the governing agreement makes any reference to the GCC; (ii) the parties to the original agreement are neither signatory to the GCC nor the GCC is

made part of the original agreement entered into between the parties; (iii) even as per the communication dated 16.07.2020, the GCC, July 2020 shall be applicable to works contracts on Indian Railways with prospective effect. It is submitted that therefore the High Court has seriously erred in directing to constitute an Arbitral Tribunal as per clause 64(3)(b) of the GCC.

4. Shri K.M. Nataraj, learned ASG appearing on behalf of the respondent is not in a position to dispute that after the invocation of the arbitration clause, the General Manager/Railway failed to appoint the sole arbitrator in terms of the agreement. He is also not in a position to satisfy the Court as to how the General Conditions of Contract shall be applicable with respect to the agreement between the parties which has been entered into much prior to the GCC coming into force i.e., July, 2020 and that neither is there any reference to the GCC in the original agreement nor the GCC has been signed by the parties. Therefore, he is unable to support the impugned judgment and order passed by the High Court directing to constitute an Arbitral Tribunal as per clause 64(3)(b) of the GCC.

5. We have heard the learned counsel appearing on behalf of the respective parties at length.
6. It is not in dispute that the parties to the agreement agreed to resolve the dispute as per clause 32 of the original agreement which reads as under: -

**“32. Arbitration.**

(a) In the event of any question, dispute or difference arising under or in connection with this Agreement (except as to matters the decision of which is specially provided for by this Agreement) the same shall be referred to the sole arbitration of a person appointed to be the arbitrator, by the General Manager or the Railway. It will be no objection if the arbitrator is a Government servant, that he had to deal with matters to which the Agreement relates or that in the course of his duties as a Government servant he has expressed views on all or any of the matters in dispute or difference. The Award of the arbitrator shall be final and binding on the parties to this Agreement.

Provided always that the decision of the General Manager of the Railway as to the disputes which fell within the “excepted matters” referred to above shall be final and binding on the parties hereto and such decision of the General Manager shall not be called in question before the arbitrator by either of the parties hereto.

(b) In the event of the arbitrator dying, neglecting or refusing to act, or resigning or being unable to act for any reason, or his award being set aside by the Court for any reason it shall be lawful for the authority appointing the arbitrator to appoint another arbitrator in place of the outgoing arbitrator in the manner aforesaid.

(c) It is further a term of this Agreement that no person other than the person appointed by the authority as aforesaid should act as arbitrator and

that if for any reason that is not possible, the matter is not be referred to arbitration at all.

.....”

The appellant and the respondent being signatories to the agreement are bound by the aforesaid arbitration clause/arbitration agreement. As the dispute arose between the parties, the appellant invoked the arbitration clause in terms of the agreement. However, the respondent – General Manager/Railway failed to appoint the arbitrator in terms of clause 32, reproduced hereinabove. That thereafter, the appellant herein approached the High Court for appointment of the sole arbitrator in exercise of powers under Section 11(6) of the Act. Once the dispute has arisen between the parties and despite invocation of the arbitration clause in terms of the agreement no arbitrator is appointed, it can be said that the authority has forfeited its right to appoint the arbitrator in terms of the arbitration agreement and thereafter the arbitrator has to be appointed under Section 11(6) of the Act.

6.1 At this stage, the decision of this court in the case of **Deep Trading Company** (supra) is required to be referred to. In

the said decision it is observed and held that once an arbitrator is not appointed as per the agreed procedure within stipulated time, right of the party concerned to appoint an arbitrator is forfeited and therefore, Chief Justice ought to have appointed an arbitrator under Section 11(6) of the Act. In the said decision the Corporation therein appointed the arbitrator as per the agreed procedure during pendency of the proceedings under Section 11(6) of the Act and to that it is observed and held that appointment of arbitrator by the Corporation during pendency of the proceedings under Section 11(6) of the Act was of no consequence, as failing to appoint an arbitrator within the prescribed time, the Corporation had lost its right to appoint an arbitrator.

- 6.2 In the present case also, the respondent failed to appoint an arbitrator as per the agreed procedure and in terms of the agreement. Therefore, the respondent forfeited its right to appoint an arbitrator in terms of the agreement and therefore the appellant was justified in filing the application before the High Court for appointment of a sole arbitrator in exercise of powers under Section 11(6) of the Act. The Chief



Justice or his nominee thus was required to appoint the arbitrator under Section 11(6) of the Act.

7. By the impugned judgment and order and while allowing the application under Section 11(6) of the Act instead of appointing the arbitrator in exercise of powers under Section 11(6) of the Act, the High Court has directed to constitute an Arbitral Tribunal in terms of clause 64(3)(b) of the GCC. It is not in dispute that neither the GCC was signed by the parties nor the GCC was made part of the agreement between the parties. There is no reference to the GCC in the main agreement entered into between the parties. Even as per communication dated 16.07.2020, the GCC, July 2020 shall be applicable to works contract of Indian Railways with prospective effect. Therefore, the parties are not governed by the GCC at all. Therefore, the High Court has committed a serious error in directing to constitute an Arbitral Tribunal in terms of the provisions of the GCC, which are not binding to the parties.
8. In view of the above and for the reasons stated above the impugned judgment and order passed by the High Court to the extent directing to constitute an Arbitral Tribunal in

terms of clause 64(3)(b) of the GCC is unsustainable and deserves to be quashed and set aside and is accordingly quashed and set aside. The Chief Justice or his nominee was required to appoint a sole arbitrator/arbitrator in exercise of powers under Section 11(6) of the Act. The High Court has failed to appoint the sole arbitrator in exercise of powers under Section 11(6) of the Act. Therefore, as such the matter is required to be remanded to the High Court for appointment of a sole arbitrator. However, instead of remanding the matter to the High Court and to avoid any further delay, with the consent of the learned counsel appearing on behalf of the respective parties, we appoint Smt. Justice R. Banumathi, Former Judge of this Court, as a sole arbitrator to adjudicate and resolve the dispute between the parties. The present appeal is accordingly allowed. No costs.

.....J.  
[M.R. SHAH]

NEW DELHI;  
July 27, 2022

.....J.  
[B.V. NAGARATHNA]