

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on: May 24, 2013*
Judgment delivered on: July 01, 2013

+ **Arb.P.No.31/2013**

HINDUSTAN CONSTRUCTION COMPANY LTD Petitioner
Through Mr.Dherainder Negi, Adv. with
Ms.Smita Bhargava, Adv.

versus

IRCON INTERNATIONAL LTD Respondent
Through Mr.Arun Khosla, Adv. with
Ms.Shreeanka Kakkar, Adv.

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CORAM:
HON'BLE MR. JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. By this common order, I propose to decide the two abovementioned petitions filed by the petitioner, under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act') for appointment of an independent person as sole Arbitrator for resolving the disputes and

differences which have arisen between the parties in relation to Contract Nos.IRCON/1014/J&K.KQ/Zone-VB/60 and IRCON/1014/J&K.KQ/Zone-VA/59, dated 18th February, 2006.

2. In Arb.P.No.31/2013, the petitioner raised the principal claim for additional cost and expenses incurred during the extended period of the contract from 24th April, 2009 to 28th February, 2011 amounting to ₹48,88,96,602/- whereas in Arb.P.No.32/2013, the claim for additional cost and expenses incurred during the extended period of the contract from 10th April, 2009 to 28th February, 2011 amounting to ₹64,36,06,524/- was raised, before the Engineer in Charge as well as the respondent on various occasions, including the claim for rate revision of excavation due to instructed change in methodology for south portal excavation amounting to ₹5,37,48,687/-.

3. Various attempts have been made by the parties through correspondences and meetings. However, dispute between the parties could not be resolved. On 12th June, 2012, the respondent had rejected the petitioner's claim for additional cost and expenses incurred during the extended period. The petitioner issued notice of dispute dated 28th June, 2012 to the respondent which was delivered in person to the General Manager of the respondent at its office on 20th July, 2012. There was no response to the said notice of dispute.

4. The petitioner by its another letter dated 27th/17th August, 2012 (notice of conciliation) dispatched on 27th August, 2012 requested the Managing Director of the respondent (appointing authority) to provide a panel of names of Conciliators to enable the commencement of conciliation proceedings. Since the petitioner did not receive any response to the notice of conciliation, as per the case of the petitioner, by notice recording rejection

of conciliation dated 12th October, 2012, the petitioner notified the respondent that since it had not received any response to its aforesaid letters, such inaction would amount to rejection of the petitioner's request for conciliation. The petitioner on the same day issued the notice of arbitration and requested the Managing Director of the respondent to provide the panel of names of Arbitrators for reference of disputes and differences through arbitration. Copy of the said notice of arbitration dated 12th October, 2012 has been filed by the petitioner. However, no response was received from the Managing Director of the respondent till filing of the present petitions. Therefore, the prayer is made in both the petitions for appointment of an independent person as sole Arbitrator for adjudication of the disputes and differences between the parties.

5. The tender document included a 'Special Conditions of Contract (SCC)' which was later amended. Clause 59.3 of this agreement, as amended outlines the following procedure for the settlement of a dispute between the parties:-

- (i) An attempt to mutually settle the dispute (Cl. 59.3.i).
- (ii) If the Contractor is not satisfied with this settlement, he may refer the matter to "Conciliation/Arbitration" (Cl. 59.3.ii).
- (iii) The first stage involves conciliation, as per the procedure in the Arbitration and Conciliation Act, 1996 (Cl. 59.3.iv – as per amendment no. 17 in the corrigendum-1)
- (iv) In the event conciliation fails, the dispute may be referred to the MD of the Employer to be settled by arbitration, as per the Act (Cl. 59.3.iv(c) – as per as per amendment no. 17 in the corrigendum-1)
- (v) The MD may either act as an arbitrator himself, or may appoint an arbitrator/s for which purpose, a panel of names is to be sent

to the Contractor (procedure outlined in Cl. 59.3.iiias per amendment no. 17 in corrigendum-1). As per the amended clause, no number of arbitrators has been specified in the contract.

6. In terms of Clause 59.3 (ii) SCC read with Amendment No.17 of 1st Corrigendum cum Addendum dated 14th January, 2005, the Managing Director of the respondent was to provide a panel of names to the petitioner for nomination of Conciliator. Further, amended Clause 59.3 (iv) (b) provides that *“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.”*

7. The respondent in its reply to the petitions which was filed by way of short counter-affidavit of Anand Prakash, Executive Director of the respondent Company contends that the procedure for appointing an arbitrator must be as per General Conditions of the contract which is a part of the tender document. As per this procedure, in cases where the total value of claims exceeds 10 lakhs (as in the present case), the tribunal shall consist of three Railway officers, out of which only one arbitrator can be appointed as per the suggestion of the Contractor.

8. The respondent, therefore, contends that the right procedure that must be followed is that, the tribunal should consist of three members and requests the court to direct the applicant to comply with the terms of the General Conditions of Contract (GCC) in relation to the appointment of arbitrators. The petitioner is misreading the terms of the contract and unnecessarily insisting upon the appointment of a sole Arbitrator when the nature of disputes calls for the constitution of a panel of three Arbitrators in the manner prescribed in the clauses, as Clause 59.3 of SCC has to be read

in conjunction with Clause 63(3) (a)(ii) of the SCC as also the amendment to the Arbitration clause.

9. In its rejoinder, the petitioner submits that the respondent can no longer rely upon the procedure in the arbitration agreement for the appointment of a tribunal due to the lapse of time and the filing of a 11(6) application. It moreover contends that the right procedure for the appointment is to be found in the SCC only. Learned counsel for the petitioner firstly insists for the prayer made in both petitions and alternatively, if the Court is satisfied with the nature of invocation of arbitration, then the petitioner is pressing for the procedure for appointment as available in SCC only.

10. As per ***SBP & Co. Vs. Patel Engineering Ltd. & Anr.*** (2005) 8 SCC 618, the Court is required to look into the existence and validity of the arbitration agreement. The issue that needs to be looked into here is whether the terms of the GCC were incorporated in the contract, especially in relation to the arbitration agreement.

As per the judgment of the Supreme Court in the case of ***M.R. Engineers and Contractors Pvt. Ltd. vs. Som Datt Builders Ltd.***, (2009) 7 SCC 696, incorporation by reference can happen only when the context of incorporation is appropriate, and when, there is clear intention for the parties to incorporate a document. Here, while the GCC is a part of the tender document, it has various other clauses which deal with the specifics of the construction contract. Moreover, since there is a ‘special’ part of the contract which contains a dispute resolution clause, it would over-ride any other document (since there is no reference to the GCC).

11. As per ***SBP v. Patel Engineering’s*** case (*supra*), the court must look into whether or not there is an existing arbitration agreement. It can be

argued that as per the SCC, there is no certainty in choosing arbitration as the dispute resolution mechanism (certainty and intention are the main requirements as per ***Jagdish Chander v. Ramesh Chander***) because of the presence of the term “may be referred to arbitration” in the even conciliation fails. This could indicate that the contract requires the parties to agree again upon arbitration as a method of dispute resolution. As per ***Jagdish Chander***, “Where there is merely a possibility of the parties agreeing to arbitration in future, as contrasted from an obligation to refer disputes to arbitration, there is no valid and binding arbitration agreement.” (Para 8)

12. Moreover, as per Clause 59.4, the Contractor shall not approach any Court of Law for settlement of a dispute, unless an attempt has been made under clauses 59.2 (mutual settlement) or 59.3 (conciliation or arbitration). Since there definitely has been an attempt by the respondent to settle the dispute via conciliation, this would discharge its obligation to attempt dispute resolution under 59.3 and would be free to approach the courts. This does not indicate clear intention to arbitrate the dispute, thus creating more doubt as to the existence of an arbitration agreement itself.

13. In the present case, it can be said that the procedure for the appointment of a panel of three arbitrators will not be applicable and the right procedure to appoint would be as per the SCC.

14. Section 11(6) of the Arbitration and Conciliation Act, 1996 does not specify a time period within which a party has to respond – this needs to be in accordance with the agreement between the parties. If such time period is not specified, a lapse of reasonable time without notice from the other party would extinguish its right to continue with the appointment as per the procedure in the contract. This has been derived from the judgment of the Supreme Court in ***Datar Switchgears v. Tata Finance Ltd.***, (2000) 8 SCC

151. In the present case, the request for arbitration was sent to the Respondent on October 12th 2012. The 11(6) application was filed on January 17th 2013, which indicates a lapse of 96 days, which can be considered to be a reasonable time period.

15. Mr.Khosla, learned counsel appearing on behalf of the respondent has argued that the documents placed on record by the petitioner would establish that the Chairman-cum-Managing Director of the respondent Company was never put to notice with regard to invoking arbitration disputes, therefore, such invocation of the statutory provisions is contrary to law.

16. Learned counsel for the petitioner argued that despite of invoking the notice of arbitration by letter dated 12th October, 2012 requesting the Managing Director of the respondent to provide the panel of names of Arbitrators for reference of disputes to arbitration, the Managing Director of the respondent Company has failed to take necessary steps towards the appointment of arbitrators within the prescribed time. Therefore, the petitioner was constrained to file the present petitions under Section 11(6) of the Act.

17. It is a well settled principle of law that for a case falling under Section 11(6) of the Act, if the opposite party (respondent) fails to appoint an arbitrator within the time prescribed in the contract and before the former party (petitioner) files a Section 11 application before the Court seeking appointment of an Arbitrator, then right of the opposite party to appoint an Arbitrator ceases on Section 11 application being filed.

18. The present petitions were filed by the petitioner on 17th January, 2013. Before filing of the same, it appears from the record that the petitioner has issued two notices dated 12th October, 2012, one to the General Manager of the respondent Company and copy to its Executive

Director, bearing No.HCC/HYD/CONT/PA/306 and another to the Managing Director of the respondent Company and copies to Executive Director and the General Manager of the respondent Company, bearing No.HCC/HYD/CONT/PA/307. In the first notice, it was informed by the petitioner to the respondent that the request was made by the petitioner to the Managing Director of the respondent Company to provide the panel names of conciliators for initiating the conciliation proceedings, however, no response was received from the respondent. Therefore, the said letter treats the same as a rejection by the respondent of the offer for conciliation. The second letter issued by the petitioner informing the Managing Director of the respondent Company that no response was received to the letters issued by the petitioner. Therefore, the petitioner is referring the disputes/differences to the Managing Director for their settlement through arbitration and he was also asked to provide the panel names of the arbitrators so that the arbitration proceedings may be commenced at the earliest.

19. Mr.Khosla is disputing the receipt of this letter dated 12th October, 2012 issued to the Managing Director. He submits that the respondent is also disputing the courier receipt filed by the petitioner in this regard. The certificate issued by the courier service no doubt show the stamp of the respondent company. As already mentioned that the said alleged letter issued to the Managing Director was not responded by the respondent within 30 days. However, response was given by the respondent on 12th March, 2012 acknowledging the letter bearing No.HCC/HYD/CONT/PA/307 dated 12th October, 2012 addressed to the respondent with regard to settlement of disputes through arbitration in terms of Clause 59.3 of SCC and the amendment thereof. However, instead of asking the petitioner to select one name out of the suggested three names, the respondent called upon the

petitioner to select two names out of three. The said suggestion/course was not acceptable to the petitioner under the provisions of the contract as amended.

20. The contention of the learned counsel for the petitioner is that on the one hand, the respondent's letter dated 12th March, 2013 establishes its intention to appoint a sole Arbitrator but on the other hand, instead of asking the petitioner to appoint one name out of the suggested names, the respondent called upon the petitioner to select two names out of three. Therefore, the petitioner is not agreeable for the said suggestion made by the respondent. He says that even otherwise, the said response was not received by the petitioner within 30 days period of invocation of the arbitration proceedings. Therefore, this Court either should appoint an independent arbitrator or an option be given to the petitioner to select one name to be appointed as sole Arbitrator instead of panel of three arbitrators.

21. I find force in the submission of the learned counsel for the petitioner. It is evident from the record that the petitioner has sent the letter dated 12th October, 2012 to the General Manager as well as the Managing Director of the respondent. The evidence in this regard is available on record. The said letters were not replied by the respondent within 30 days time. The first response came from the respondent's side only on 12th March, 2013. It is pertinent to mention that in the said letter received by the petitioner from the respondent on 12th March, 2013 acknowledging the letter bearing No.HCC/HYD/CONT/PA/307 dated 12th October, 2012 which was sent to the Managing Director, therefore, by implicit it appears that the letter was sent to the Managing Director also by the petitioner. With regard to the prayer of the petitioner for appointment of an independent sole Arbitrator, no notice was issued by the petitioner in this regard informing the

respondent for appointment of an independent sole Arbitrator rather in the notice issued by the petitioner, it requested the respondent to provide the panel names of the arbitrators so that the arbitration proceedings be commenced at the earliest even after filing the present petition as per correspondence available in the months of March and April, 2013. There is no whisper in the said notice for appointment of independent arbitrator, therefore, it would be appropriate for this Court to allow the prayer made by the petitioner only to the extent to appoint the sole arbitrator from the nominated panel of three persons for the purpose of constitution of arbitral tribunal, the details of whom are mentioned in the letter dated 12th March, 2013 issued by the respondent to the petitioner. The petitioner, under these circumstances, is allowed to suggest one name out of three members panel within 30 days from the date of this order, informing the Managing Director of the respondent Company for appointment of a sole arbitrator in the Arbitral Tribunal.

22. The petitions are disposed of in the above said terms.

(MANMOHAN SINGH)
JUDGE

JULY 01, 2013