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

+ **Arb. P. 5/2014**

Judgement Reserved on: 15th July, 2014
Judgement pronounced on: 21st July, 2014

MADHAVA HYTECH-RANI(JV) Petitioner
Through : Ms. Geeta Luthra, Sr. Adv.
with Mr.N.Raja Raman,
Mr. R.D. Torora,
Mr. Subrata Das, Advs.

versus

THE MANAGING DIRECTOR IRCON INTERNATIONAL LTD & ANR
..... Respondent
Through : Mr. Shankar Kumar Jha,
Adv.

CORAM:
HON'BLE MS. JUSTICE DEEPA SHARMA

JUDGMENT

1. The present petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “the act”) for appointment of an arbitrator to adjudicate upon the

disputes between the parties arising out of an agreement dated 20th June, 2007.

2. The case of the petitioner is that on 27th September, 2010, the respondents terminated the contract with the petitioner. On the same date, the petitioner approached the Patna Civil Court in OS No. 584/2010 on 28th September, 2010 and sought declaration of termination of the contract by respondents to be null and void. However, in November, 2012, the petitioner withdrew the said suit. Vide a letter dated 27th October, 2012, the petitioner invoked its right under clause 72.2.3 of the contract to resort to method of arbitration for resolution of their dispute. The respondents, however, failed to appoint an Arbitrator. The petitioner has also submitted that they had also filed a Company Petition for recovery of dues under Section 433 of the Companies Act. On these facts, it has been prayed that an Arbitrator be appointed for resolution of all disputes between the parties.

3. A short counter affidavit is filed by the respondents. It is

submitted that the arbitration invocation letter dated 27th October, 2012 of the petitioner was duly replied by the respondents vide their letter dated 11th February, 2013, wherein in terms of arbitration clause 72.2.3 of General Conditions of Contract (GCC), the respondents formed a panel of three arbitrators asking the petitioner to choose any two of them so that one of them could be appointed as an arbitrator by them. The said letter was properly addressed and duly served upon the petitioner. The petitioner has not acted on the letter of the respondents and has not selected and intimated the two names from panel of arbitrators. It is submitted that the petitioner had themselves filed copy of the letter dated 5th April, 2013 of the counsel for the respondents, a reply to statutory notice of petitioner under Section 433 of the Companies Act. In the letter dated 5th April, 2013, the counsel for the respondents had clearly mentioned that the invocation letter dated 27th October, 2012 of petitioner was duly replied by respondents vide its letter dated 11th February, 2013. It is submitted that the said letter, therefore, was within the

knowledge of the petitioner at the time of filing of the present petition and still this fact was concealed from the knowledge of this court. It is submitted that the respondents had done the needful as per the arbitration clause 72.2.3. It is further submitted that a procedure for appointment of an Arbitrator had been provided in clause 72.2.3 of the agreement and it is the petitioner who has failed to complete the required procedure. It is submitted that the respondent has not defaulted anywhere.

4. The petitioner has filed the rejoinder. In the rejoinder, the petitioner has again denied the receipt of the letter dated 11th February, 2013 and has denied that it was served or sent as per the procedure prescribed under general clause act and other provisions of the law.

5. I have heard the arguments of learned counsel of both the parties and perused the record.

6. There is no dispute to the fact that vide letter dated 27th

October, 2012, the petitioner had invoked the arbitration clause No. 72.2.3. Para 6 of the said communication reads as under:-

“6 Therefore, we hereby invoke clause 72.2.3 of the contract to resolve our disputes through arbitration. As an impartial award is not expected from a sole arbitrator from IRCON, arbitration by a tribunal of three arbitrators as per Arbitration and Conciliation Act, 1996 may be appointed in the matter. You are requested to nominate your arbitrator to proceed further.”

7. The petitioner has invoked the jurisdiction of this court under Section 11 of the Arbitration and Conciliation Act, on the ground that the respondents had failed to appoint the arbitrator. Section 11 (6) (a) of Arbitration and Conciliation Act reads as under:-

“6 Where, under an appointment procedure agreed upon by the parties,--

(a) a party fails to act as required under that procedure; or”

8. It, therefore, is clear that this court under Section 11 (b) (a) has the jurisdiction to appoint an arbitrator as and when party fails to act as required under the agreed procedure for appointment of arbitrator. In this case, the procedure for appointment of arbitrator was agreed by parties in terms of clause 72.2.3 of agreement.

9. Clause 72.2.3 of the agreement prescribes the procedure for appointment of Arbitrator and reads as under:-

Clause 72.2.3

“Managing Director of the Employer may himself act as Sole Conciliator/Sole Arbitrator or may at his option appoint another person as Sole conciliator or Sole Arbitrator, as the case may be. In case, Managing Director of the Employer decides to

appoint a Sole Conciliator/Sole Arbitrator, then a panel of at least three names will be sent to the Contractor. Such persons may be working/retired employees of the Employer who had not been connected with the work. The Contractor shall suggest minimum two names out of this panel for appointment of Sole Conciliator/Sole Arbitrator. Managing director of the Employer will appoint Sole Conciliator/Sole Arbitrator out of the names agreed by the Contractor”.

10. It is clear from para 6 of the communication dated 27th October, 2012, that the petitioner has deviated from the procedure agreed upon between the parties for appointment of arbitrator. On the other hand, the respondents have placed on record its communication dated 11th February, 2013 in response to the petitioner’s letter dated 27th October, 2012. The respondents in the letter has suggested three names, out of which one could act

as an Arbitrator and the petitioner was called upon to suggest two names from the said panel. The respondents have placed on record this letter along with the courier receipt.

11. The petitioner in his rejoinder has denied the receipt of this letter. It is apparent that this letter has been issued by the respondents much before the filing of the present petition. Although, the petitioners have disputed the receipt of this communication, however, certain facts in the form of documents, belie the contention of the petitioner that this letter was not received by them. The fact that the petitioner had filed a company petition against the respondents is an admitted fact. The respondents have placed on record the record of the said company petition and the Index of papers submitted by the petitioner with that company petition includes reply dated 5th April, 2013 by counsel for the respondents, a reply to statutory notice of petition under Section 433 of the Companies Act. This letter dated 5th April, 2013 has a reference of the letter of the respondents dated

11th February, 2013, which was sent by respondents to the petitioner in response to their letter dated 27th October, 2012. The present petition has been filed on 26th October, 2013. It, therefore, is clear that on the date of filing of the present petition, the petitioner was aware of the fact that the respondents had constituted an Arbitral Tribunal Panel of three persons and had asked the petitioner to choose any two names from the said panel for the appointment of one Arbitrator. Besides that, the respondents have also placed on record the copy of the letter dated 11th February, 2013 which was duly sent and received by the recipient.

12. In view of these facts, I am not inclined to accept the contention of the petitioner in the rejoinder as well as in the arguments that the said letter has not been received by the petitioner. The agreement provides that the Arbitrator shall not be connected with the work in question and it is not the case of the petitioner that any of the members of the Arbitral Tribunal Panel

suggested by the respondents in their communication dated 11th February, 2013 are connected with the work in question. In the communication dated 27th October, 2012, while invoking the arbitration clause 72.2.3, the petitioners have claimed that they do not expect an impartial award from the sole arbitrator. Undisputedly petitioner had entered into the contract with respondents on 27th June, 2007 and the terms of agreement contain the clause 72.2.3. Meaning thereby, they themselves had agreed to the appointment of sole arbitrator in terms of clause 72.2.3. Their apprehension of not getting an impartial award is unfounded. The Arbitrator could be a working/retired employee but not connected with the awarded work to the petitioner. The Petitioners also have remedy under Section 12 & 13 of the Act, in case they doubt the impartiality of the appointed arbitrator.

13. I find no merit in this petition and the same is dismissed with the observation that the petitioner can still respond to the respondents letter dated 11th February, 2013.

14. The petition is disposed of in the above terms.

15. No order as to costs.

(DEEPA SHARMA)
JUDGE

JULY 21 , 2014
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