

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

% **Date of Decision: 23rd December, 2015**

+ **ARB.P. 521/2015**

HINDUSTAN CONSTRUCTION COMPANY LTD. Petitioner
Through: Mr. Rajeev Nayar, Sr. Adv. with
Mr.Dhirendra Negi, Mr. Divyam
Agarwal and Mr. Saurabh Seth, Advs.

versus

IRCON INTERNATIONAL LIMITED Respondent
Through: Mr. Dinesh Agnani, Sr. Adv. with
Ms. Leena Tuteja and Mr. Ishaan
Chawla, Advs.

AND

+ **ARB.P. 522/2015**

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Mr.Dhirendra Negi, Mr. Divyam
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CORAM:
HON'BLE MR. JUSTICE J.R. MIDHA

JUDGMENT

1. The petitioner is seeking appointment of an arbitrator under Section 11(6) of the Arbitration and Conciliation Act, 1996.

2. There are valid arbitration agreements between the parties contained in clause 59.3 of the agreements dated 18th February, 2006. The petitioner validly invoked the arbitration vide notices dated 31st July, 2015 to adjudicate the disputes between the parties.

3. Learned senior counsel for the respondent has opposed this petition as premature on the ground that the agreements provide for conciliation proceedings by a conciliator before reference of the same to the arbitrator. It was submitted that the petitioner invoked the conciliation process but filed this petition without waiting for the conclusion of the conciliation proceedings and therefore, the petition was premature. It was submitted that the sole conciliator was appointed on 28th May, 2014 and vide notice dated 29th May, 2014, the conciliator called upon both the parties to file their claim/counter-claims. The petitioner did not file the claim before the conciliator who issued a reminder dated 25th March, 2015. Vide letter dated 9th April, 2015, the petitioner sought further time to file the claim before the conciliator. The petitioner filed the claim before the conciliator on 28th April, 2015. The respondent vide letter dated 26th May, 2015 sought time to respond to the petitioner's claim. The respondent filed the response as well as counter-claim before the conciliator on 14th August, 2015. In the meantime, vide letter dated 22nd July, 2015, the petitioner notified that there was failure of conciliation. The conciliator in the meantime vide letter dated 26th August, 2015 fixed the first hearing of the conciliation on 14th September, 2015. However, the petitioner vide letter dated 9th September, 2015 refused to appear before the conciliator and took a stand that conciliation proceedings stood terminated. The conciliator therefore terminated the conciliation proceedings vide order dated 17th September, 2015. The respondent vide letter dated 26th October, 2015 proposed the names of the arbitrators from the nominated panel of northern Railways to

the Petitioner. The petitioner vide letter dated 30th October 2015, opposed the respondent's communication on the ground that the respondent forfeited its right in view of the filing of the present petition.

4. Learned senior counsel for the petitioner urged at the time of the hearing that the agreements between the parties provide for sixty days for conclusion of the conciliation proceedings. Vide letter dated 22nd July, 2015, the petitioner intimated the conciliator that more than 80 days had passed without any steps having been taken in respect of the conciliation and therefore, in terms of the contract, it was treating the conciliation as having failed. The petitioner thereafter invoked the arbitration on 31st July, 2015 calling upon the Managing Director of the respondent to provide a panel of names from which the arbitrator was to be appointed by the parties. The belated filing of reply by the respondent before the conciliator on 14th August, 2015 and the recording the failure of conciliation on 17th September, 2015 is of no avail. The petitioner, vide letter dated 9th September, 2015 reiterated the failure of conciliation as already stated in letter dated 22nd July, 2015 to the conciliator. It was further submitted that this petition was filed on 15th September, 2015 and no response was received from Managing Director of the respondent till the filing of the present petition.

5. Learned counsel for the petitioner further submitted that the names proposed by the petitioner vide letter dated 26th October, 2015 are not eligible to act as arbitrator in view of Section 12(1)(a) read with Fifth Schedule of the Arbitration and Conciliation (Amendment) Ordinance, 2015.

6. On careful consideration of the rival contentions of the parties, this Court is satisfied that there are valid arbitration agreements between the parties. The petitioner validly invoked the arbitration vide notices dated 31st July, 2015. The petitioner filed this petition on 15th September, 2015. The

respondent forwarded the names for appointment of the arbitrator after the filing of the petition on 26th October, 2015. This Court does not agree with the respondent that the petition was premature. Since the agreements provide for a period of sixty days for conclusion of conciliation, the petitioner was justified in treating the conciliation as having failed vide notice dated 22nd July, 2015. The filing of the reply by the respondent thereafter on 14th August, 2015 and the hearing dated 14th July, 2015 just to record the failure is of no avail. Even according to the respondent, the conciliation failed on 14th September, 2015. In that view of the matter, there was no justification for the Managing Director of the respondent to have waited till 26th October, 2015 to propose the names in terms of the agreements. Since this petition has been filed on 15th September, 2015, the respondent has lost its right to appoint the arbitrator. Even otherwise the names proposed by the respondent do not appear to be eligible in view of Section 12(1)(a) and Fifth Schedule of the Arbitration and Conciliation (Amendment) Ordinance, 2015.

7. The petitions are allowed and Justice P.K. Bahri (Retd.). is appointed as the sole arbitrator to adjudicate the disputes between the parties including their claims and counter-claims.

8. The learned arbitrator shall ensure the compliance of the provisions of Arbitration and Conciliation (Amendment) Ordinance, 2015 dated 23rd October, 2015 before commencing the arbitration.

9. Copy of this judgment be given *dasti* to counsel for the parties under the signature of the Court Master. A copy of this judgment be sent to the learned Arbitrator.

J.R. MIDHA, J.

DECEMBER 23, 2015

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