

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment delivered on: 19.12.2016

+ **ARB.P. 159/2016**

MADHAVA HYTECH-RANI (JV)

..... Petitioner

Versus

IRCON INTERNATIONAL LIMITED

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Dr Amit George, Mr Swaroop George
and Ms Rajsree Ajay.

For the Respondent : Mr Nandan Kumar and Mr Tushar
Chauhan.

CORAM

HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. Madhava Hytech-Rani (JV) (hereafter 'Madhava') has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act') for appointment of a sole Arbitrator to adjudicate the disputes that have arisen between the parties in connection with a contract dated 05.12.2007.

2. The Respondent, IRCON International Ltd. (hereafter 'IRCON'), opposes the present petition principally on the ground that an earlier petition filed by Madhava for similar reliefs was dismissed and therefore, one of the persons - who are employees of IRCON - is to be appointed as an arbitrator.

3. The aforesaid controversy arises in the context of the following facts:

3.1 IRCON invited bids for the work of 'improvement and up-gradation of existing road of state highways into 2 lanes road from Laheriasarai (Ch-0.000 Km.) to Hanuman Nagar (Ch-16.471 Km.) in Darbhanga District of 16.471 Km. length' (hereafter 'the work'). Madhava having submitted the lowest tender was issued a Letter of Intent on 30.10.2007. Thereafter, Madhava and IRCON signed the Contract on 05.12.2007 (hereafter 'the Contract') for execution of the works. The Contract was required to be completed by 29.10.2009.

3.2 Clause 72 of the Contract provided for the settlement of disputes by arbitration, the relevant extract of which is set out below:

“72.0 SETTLEMENT OF DISPUTES

All disputes or differences of any kind whatsoever that may arise between the Employer /Engineer and the Contractor in connection with or arising out of the contract or subject matter thereof or the execution of works, whether during the progress of works or after their completion, whether before or after determination of-contract shall be settled as under:-

72.1 Mutual settlement

All such disputes or differences shall in the first place be referred by the Contractor to the Employer in writing for resolving the same through mutual discussions, negotiations, deliberation etc. associating representatives from both the sides and concerted efforts shall be made for reaching amicable settlement of disputes or differences.

72.2 Conciliation/Arbitration

72.2.1 It is a term of this contract that Conciliation/Arbitration of disputes shall not be commenced unless an attempt has first been made by the parties to settle such disputes through mutual settlement.

72.2.2 If the Contractor is not satisfied with the settlement by the Employer on any matter in question, disputes or differences, the Contractor may refer to the Managing Director of the Employer in writing to settle such disputes or differences, through Conciliation or Arbitration provided that the demand for Conciliation or Arbitration shall specify the matters, which are in question or subject of the disputes or differences as also the amount of claim, item wise. Only such dispute (s) or difference (s) in respect of which the demand has been made, together with counter claims of the Employer shall be referred to Conciliator or Arbitrator as the case may be and other matters shall not be included in the reference.

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 atleast 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.

72.2.4 In case, the Contractor opts for settlement of disputes through Conciliation at first stage and if the efforts to resolve all or any of the disputes thorough Conciliation fails, the Contractor may refer to the Managing Director of the Employer for settlement of such disputes or differences through Arbitration. The appointment of Sole Arbitrator shall be done by the Managing Director of the Employer as per the procedure described above. No disputes or differences shall be referred to Arbitration after expiry of 60 days from the date of notification of failure of Conciliation.

72.2.5 The Conciliation and/or Arbitration proceedings shall be governed by the provisions of the Indian Arbitration and Conciliation Act 1996 or any statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the conciliation and arbitration proceedings under this clause.”

3.3 According to Madhava, it faced several difficulties on the work site - all attributable to IRCON - which delayed the execution of the work. This led Madhava to invoke the arbitration clause and seek appointment of an arbitrator to adjudicate disputes regarding idling of machinery due to non-utilization of equipment, unprecedented price rise, etc. on 04.04.2009. Thereafter, on 29.05.2010, Madhava made representations to IRCON for release of pending amounts, followed by another representation reiterating its demand for appointment of an arbitrator.

3.4 By a communication dated 22.07.2010, IRCON advised Madhava to resort to resolution of disputes by mutual settlement in terms of its earlier letter dated 27.04.2009. According to Madhava, it had not received the letter dated 27.04.2009; this was subsequently provided to Madhava on

04.08.2010, on its request. Madhava, by a communication dated 10.09.2010, sent a contract-wise statement of the disputes and requested for an amicable settlement of disputes.

3.5 In the meanwhile, IRCON at the request of Madhava extended the time for completion of the work till 31.12.2010 by its letter dated 29.06.2010.

3.6 On 15.09.2010, IRCON issued a letter to Madhava wherein it granted a week's time to Madhava to remedy the manner of execution of the Contract. Madhava sent a letter dated 20.09.2010, seeking release of the pending bills. In response to Madhava's letter dated 10.09.2010, IRCON by its letter dated 22.09.2010, summarily rejected the claims of Madhava without any discussion or negotiation. Thereafter, by letter dated 27.09.2010, IRCON terminated the Contract and proceeded to invoke the bank guarantees (hereafter 'BGs') furnished by Madhava.

3.7 Subsequent to the encashment of the BGs, IRCON by its letter dated 31.03.2012 asked Madhava to intimate the balance confirmation of the dues owed by IRCON within 15 days, failing which, the amount estimated by IRCON would be presumed to be correct. Madhava states that as per the records of IRCON, the balance amount payable was ₹1,42,51,172/-. Madhava by its letter dated 07.08.2012 sought certified copies of the running account bills and copies of the Measurement Books for the work done in order to finalize and communicate the balance confirmation as asked for by IRCON. The said letter was followed by another reminder, however, IRCON did not send a response to the same. This led Madhava to once again invoke the arbitration by its letter dated 27.10.2012.

3.8 As Madhava received no response from IRCON to the aforesaid letter dated 27.10.2012, it approached this Court by filing a petition under Section 11 of the Act for appointment of an arbitrator (in ARB.P. no. 470/2013).

3.9 Before this Court, IRCON placed a letter dated 11.02.2013 sent in response to Madhava's letter dated 27.10.2012, whereby IRCON had suggested names of three of its employees and called upon Madhava to select two of them so that IRCON could appoint one of the two to act as an arbitrator. Before this Court, Madhava contended that since all the suggested persons were employees of IRCON, it did not believe that they would render an impartial and fair decision. By an order dated 02.04.2014, this court observed that in terms of the arbitration clause, Madhava had agreed that the sole arbitrator may be a working or a retired employee of IRCON and rejected the petition with the liberty granted to Madhava to respond to the letter dated 11.02.2013 sent by IRCON. The relevant extract of the said order is set out below:-

" 3.From the aforesaid, it would appear that the petitioner sought to deviate from the procedure agreed between the parties for constitution of the Arbitral Tribunal. Notice was issued in this petition to the respondents, who have filed their reply. Along with the reply, the respondents have placed on record the communication stated to have been issued to the petitioner on 11.02.2013 in response to the petitioner's communication of 27.10.2012. The respondents sought to act in terms of Clause 72.2.3 by suggesting three names to the petitioner, one of whom could act as an Arbitrator. The petitioner was called upon to suggest two names from the said panel, one of whom could be appointed as the Arbitrator. A copy of this communication along with the courier receipt has been placed on record.

7 In my view, this apprehension of the petitioner, at this stage, has no merit. The petitioner agreed to resolution of disputes through arbitration by an Arbitrator appointed by the respondent, and also agreed that the Arbitrator may be a working/ retired employee of the respondent. The agreement provides that the Arbitrator not be connected with the work in question. It is not the petitioner's case that any or all the three names suggested by the respondent were, in any way, connected with the work assigned to the petitioner under the contract. In any event, it shall be open to the petitioner to raise its pleas in arbitration under Sections 12 and 13 before the Arbitral Tribunal.

8. Accordingly, I find no merit in this petition and the same is dismissed. It is open to the petitioner to respond to the respondent's letter dated 11.01.2013."

3.10 Thereafter, Madhava sought to appeal against the said decision before the Supreme Court by filing a Special Leave Petition, being S.L.P. (Civil) no. 14528/2014. The Supreme Court rejected the same. A review petition filed by Madhava against the order dated 02.04.2014 was also dismissed.

3.11 Madhava by a letter dated 15.01.2016, requested IRCON for the appointment of an arbitrator. The said letter was followed by another letter sent by Madhava on 25.01.2016, whereby Madhava intimated IRCON that the names on the panel forwarded by it were not eligible for appointment as arbitrators inasmuch as they were disqualified from being appointed as arbitrators on account of their employment with IRCON. IRCON did not respond to the aforesaid letter and therefore Madhava has filed the present petition seeking appointment of an arbitral tribunal.

Submissions

4. Mr Nandan Kumar, learned counsel appearing for IRCON submitted that the decision of this Court in Arb.P. 470/2013, which was the earlier petition filed by Madhava under Section 11 of the Act, had become final; therefore, Madhava was bound to choose two names out of the three names forwarded by IRCON for being appointed as an arbitrator. He earnestly contended that it was not open for Madhava to re-agitate the same issues as were considered by this Court while dismissing Madhava's earlier application under Section 11 of the Act. He stated that IRCON was ready and willing to appoint one of the two arbitrators as chosen by Madhava from the panel as suggested by IRCON.

5. Dr Amit George, learned counsel appearing for Madhava referred to the letter dated 11.02.2013 and pointed out that all the three persons suggested by IRCON to act as arbitrators were serving employees of IRCON and, therefore, were ineligible for being appointed as an arbitrator. He further submitted that the present petition could not be rejected on the principle of *res judicata* because the decision of this Court in the petition filed earlier by Madhava (Arb.P.470/2013) was rendered in the context of the un-amended Act and the provisions of Arbitration and Conciliation (Amendment) Act, 2015 (hereafter 'the Amendment Act') were not in issue. He also referred to the decision of the Supreme Court in **Shakuntla Devi v. Kamla & Ors.**: (2005) 5 SCC 390 in support of his contention.

Reasoning and Conclusion

6. At the outset, it is necessary to observe that there has been a considerable delay on the part of Madhava to respond to the IRCON's

letter dated 11.02.2013. Madhava's petition (Arb.P.470/2013) was dismissed by this Court on 02.04.2014 and the Special Leave Petition preferred against the said order was also dismissed on 04.07.2014. The Review Petition filed by Madhava was also rejected by this Court on 21.11.2014. However, Madhava responded to IRCON's letter dated 11.02.2013 only on 15.01.2016, which is almost two years after this Court had dismissed Madhava's earlier petition. However, Mr Kumar, learned counsel for IRCON did not press any objections on account of Madhava's delay in responding to IRCON's letter dated 11.02.2013; on the contrary, he stated that IRCON was ready and willing to appoint any arbitrator from the names as suggested by it in its letter dated 11.02.2013.

7. Thus, the only questions that arise for consideration are (i) whether any of the persons named by IRCON in the letter dated 11.02.2013 could be appointed as Arbitrators? and (ii) whether Madhava is precluded from approaching this Court on account of dismissal of its earlier petition?

8. It is relevant to note that in terms of clause 72.2.5 of the Contract, the parties had expressly agreed that arbitration proceedings would be governed by the Act or "any statutory modification or re-enactment".

9. The Amendment Act has introduced significant and material amendments in the Act. Section 12(1) and Section 12(5) of the Act (as amended) are relevant and read as under:-

"12. Grounds for challenge.-(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose in writing any circumstances,-

(a) such as the existence either direct or indirect, of any past or present relationship with or interest in any of the parties or in relation to the subject-

matter in dispute, whether financial, business, professional or other kind, which is likely to give rise to justifiable doubts as to his independence or impartiality; and

- (b) which are likely to affect his ability to devote sufficient time to the arbitration and in particular his ability to complete the entire arbitration within a period of twelve months.

Explanation 1.—The grounds stated in the Fifth Schedule shall guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence or impartiality of an arbitrator.

Explanation 2.—The disclosure shall be made by such person in the form specified in the Sixth Schedule.”

XXXX

XXXX

XXXX

(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator:

Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this subsection by an express agreement in writing."

10. In terms of Section 12(5) of the Act read with Schedule VII to the Act, any employee of a party to the arbitration proceeding is ineligible for being appointed as an arbitrator. Thus, none of the three persons as suggested by IRCON are eligible for being appointed as an arbitrator under the Act, as amended by virtue of the Amendment Act. This was also fairly conceded by Mr Kumar.

11. The next issue to be addressed is whether the amendments introduced by the Amendment Act would be applicable in this case. Admittedly, the arbitration clause was invoked by Madhava prior to 23.10.2015 - the date on which the Amendment Act came into force; therefore, by virtue of Section 26 of the Amendment Act, the amendments to the Act would not be applicable to the arbitral proceedings in this case, unless the parties had agreed otherwise. Section 26 of the Amendment Act is relevant and is set out below:-

"26. Act not to apply to pending arbitral proceedings. - Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act."

12. Having stated the above, it is relevant to observe that in the present case, the parties had specifically agreed that the arbitration proceedings would be governed by the Act or any statutory modification or any re-enactment thereof. Thus, the present case falls within the exception as provided under Section 26 of the Amendment Act as the parties have expressly agreed that any statutory modification to the Act would be applicable. Therefore, the Amendment Act would apply to the arbitral proceedings in this case.

13. In view of the aforesaid, Madhava had, by its letter dated 25.01.2016, requested IRCON to nominate a neutral arbitrator since the names as suggested by IRCON in its letter dated 11.02.2013 were ineligible for being appointed as arbitrators. The relevant extract of the said letter is set out below:

"5. We were offered to suggest two names amongst the following names for the appointment of arbitrator by IRCON International limited vide letter cited under reference no.1. However, since all the suggested names are serving employees of your organization they do not qualify or appointment as arbitrators as per the amended Arbitration and Conciliation Act 1996 which is in force now.

6. We have here below reproduced the section 12 (5) of Arbitration and Conciliation Act 1996,

"Section 12(5): Notwithstanding any prior agreement to the contrary, any person whose relationship, With the parties or counsel or the subject-matter of dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator.

PROVIDED that the parties may, subsequent to disputes having arisen between them waive the applicability of this sub-section by an express agreement in writing."

As per serial no. 1 of Seventh Schedule of Arbitration and Conciliation Act 1996 *"The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with the party."* Further, as per serial. no.1 of the Fifth Schedule of Arbitration and Conciliation Act, 1996 (he grounds give rise to justifiable doubts as to the independence or impartiality of arbitrators), *"The arbitrator is an employee, consultant, adviser or has any other past or present business relationship with the party".*

From the above it is clear the appointment of any of the above persons suggested by you is not in consonance with and is impermissible as per the Arbitration and Conciliation Act, 1996.

In light of the aforesaid facts and circumstances, we hereby request IRCON International Limited to consider the above, and nominate a neutral arbitrator further to which we also shall nominate a neutral arbitrator

immediately on hearing from you, without wasting any time, and both of the appointed arbitrator can thereafter select a presiding arbitrator and thereby constitute the arbitral tribunal..."

14. Admittedly, IRCON failed to respond to the said request. In the aforesaid circumstances, an independent arbitrator is required to be appointed in this case. The only question that remains is whether Madhava is entitled to approach this Court under Section 11 of the Act considering its earlier petition had been dismissed.

15. The earlier petition had been dismissed prior to the enactment of the Amendment Act. At the material time, if the parties agreed, an employee of a party to the arbitral proceedings could be appointed as an arbitrator. The said law no longer holds good as Section 12(5) of the Act begins with a non obstante clause and notwithstanding any prior agreement between the parties, a person who is related to a party as specified in Seventh Schedule to the Act would be ineligible for being appointed as an arbitrator. This issue was not before the Court while considering Madhava's earlier petition and, therefore, Madhava cannot be precluded from approaching this Court in view of the substantive change in the law.

16. In **Mathura Prasad Bajoo Jaiswal and Ors. v. Dossibai N.B. Jeejeebhoy**: (1970) 1 SCC 613, the Supreme Court had held as under:-

"7. Where the law is altered since the earlier decision, the earlier decision will not operate as res judicata between the same parties: *Tarini Charan Bhattacharjee* case. It is obvious that the matter in issue in a subsequent proceeding is not the same as in the previous proceeding, because the law interpreted is different."

17. In view of the principle as explained by the Supreme Court above, the present petition cannot be rejected solely on the ground that Madhava's earlier petition had been dismissed.

18. Before concluding, it is also necessary to observe that Madhava would always have the right to challenge the appointment of an arbitrator under Section 12 of the Act notwithstanding that it has participated in the appointment of the arbitrator. Therefore, even if IRCON's contention is accepted that only one of the three persons named must be appointed as an arbitrator - which this Court does not concur with - Madhava would prevail in its challenge to that appointment as it is not disputed that arbitrator as appointed would be ineligible to act as such. Thus, it is difficult to understand IRCON's resistance for appointment of an independent and a neutral arbitrator.

19. In view of the above, the present petition is allowed. Justice Sunita Gupta, Former Judge of Delhi High Court, (Mobile No.9910384628) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties. This is subject to the Arbitrator making the necessary disclosure under Section 12 of the Act and further not being ineligible under Section 12(5) of the Act. The fees of the Arbitrator shall be in accordance with Schedule IV to the Act.

20. The petition stands disposed of.

VIBHU BAKHRU, J

DECEMBER 19, 2016
RK