

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 19.12.2016

+ **ARB.P. 164/2016**

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.

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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 20.06.2007.

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 in Samastipur District for a length of 34.791 km' (hereafter 'the work'). Madhava having submitted the lowest tender was issued a Letter of Intent on 17.05.2007. Thereafter, Madhava and IRCON signed a contract dated 20.06.2007 (hereafter 'the Contract') for execution of the work. The Contract was required to be completed by 16.05.2009.

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 o-f 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 07.07.2010.

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 25.09.2010, 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 ₹2,51,89,265/-. Madhava by its letter dated 07.08.2012 sought the 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, Madhava approached this Court by filing a petition under Section 11 of the Act for appointment of an arbitrator (in ARB.P. no. 5/2014).

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 21.07.2014, 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 :-

"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.

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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, 2th 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."

3.10 Madhava by a letter dated 15.01.2016, requested IRCON for the appointment of an arbitrator to adjudicate the disputes between the parties.

The relevant extract of the said letter reads as under :-

"Dear Sir,

The undersigned in three instances has met the Managing Director of IRCON International Limited after the Hon'ble

Delhi High Court's order for the appointment of Arbitral Tribunal, but there is no action till date.

We further request that all future correspondence may please be sent to the address given below only:

"M/s.Madhava Hytech- Rani (JV),
H.No.681, Sector-21A1
Faridabad, Haryana-121001"

Kindly do the needful and intimate your decision at the earliest."

3.11 The aforesaid 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. The relevant extracts of the said letter dated 25.01.2016 is reproduced as under :-

"4. 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.

5. 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..."

4. Admittedly, IRCON failed to respond to the said request.
5. The controversy and the issues raised in the present petition are identical to the issues raised in Arb.P. 159/2016, which has been allowed by an order passed today. The present petition is also allowed for the same reasons as stated in the order passed in Arb. P. 159/2016. Accordingly, 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.

6. The petition stands disposed of.

VIBHU BAKHRU, J

DECEMBER 19, 2016
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