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IN THE HIGH COURT OF DELHI AT NEW DELHI

ARB.P. 596/2016

HINDUSTAN CONSTRUCTION CO. LTD Petitioner
Through: Mr. Dayan Krishnan, Senior Advocate
with Mr. Rishi Agrawala and Ms.Nadia Rafiq,
Advocates.

versus

IRCON INTERNATIONAL LTD Respondent
Through: Mr. Dinesh Agnani, Senior Advocate
with Ms. Leena Tuteja, Advocate.

And

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ARB.P. 652/2016

HINDUSTAN CONSTRUCTION CO. LTD Petitioner
Through: Mr. Dayan Krishnan, Senior Advocate
with Mr. Rishi Agrawala and Ms.Nadia Rafiq,
Advocates.

versus

IRCON INTERNATIONAL LTD Respondent
Through: Mr. Dinesh Agnani, Senior Advocate
with Ms. Leena Tuteja, Advocate.

CORAM: JUSTICE S.MURALIDHAR

ORDER
22.11.2016

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1. Both these arbitration petitions filed by the Petitioner, Hindustan Construction Company Limited, under Section 11 of the Arbitration and

Conciliation Act, 1996 ('Act') against the Respondent, Ircon International Limited, seek the appointment of an Arbitrator to adjudicate the disputes between them in terms of the Arbitration Clause 60.3 of the Contract for the construction of Package T-48 and Arbitration Clause 62.2 of the Contract for the construction of Package T-49A of the J&K Rail Link Project Dharam – Qazigund Section of Udhampur-Srinagar-Baramulla New BG Railway Line Project.

2. The relevant portions Arbitration Clause 60.3 in the Contract for the construction of Package T-48 read as under:

“60.3 Conciliation/Arbitration:-

i) It is 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.

ii) If the Contractor is not satisfied with the settlement by the Employer on any matter in question, disputes or difference, 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 dispute or difference as also the amount of claim, item wise. Only such dispute(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.

iii) Managing Director of the Employer may appoint Conciliation/s or Arbitrator/s as the case may be. For this purpose panel of names will be sent to the Contractor. Such persons may be working/retired employees of the Employer or working/retired employees of Railways, who had not been connected with the work.

iv. (a) Two Stages

Disputes shall be settled through two stages.

- Conciliation procedures as established by the "Arbitration and Conciliation Act-1996" (as amended from time to time) and in accordance with this Clause. In the event this procedure fail to resolve the dispute then;

- Arbitration procedure undertaken as provided by "The Arbitration and Conciliation Act-1996" (as amended from time to time) and in accordance with this Clause.

.....

(c) Arbitration:-

- In case where the total value of all the claims in question is less than 1000000/- (Rupees Ten Lakhs only) the arbitral tribunal will consist of a sole arbitrator.

- In case where the total value of all claims in question is more than 1000000/- (Rupees Ten Lakhs only) the arbitral tribunal will consist of panel of three serving/retired officers.

- MD, IRCON shall appoint arbitrators from the panel approved by Northern Railway.

All other condition for arbitration in generals shall be as per Northern Railway GCC 1999.

3. Clauses 62.4 (a) (ii) and (iii) of the Contract for the construction of Package T-49A, which are relevant for the present petition read as under:

“In cases where the total value of all claims/counterclaims exceeds Rs 2.00 Crore, the Arbitral Tribunal, shall consist of a panel of three Officers not below J.A grade level officer (Approved list of N.Rly).

For this purpose, the Employer will send a panel of more than 3 names to the contractor, within 60 days from the day when a written

and valid demand for arbitration is received by the Employer, the Contractor will be asked to suggest to the Chairman cum Managing Director at least 2 names out of the panel for appointment as contractor's nominee within 30 days from the date of dispatch of the request by the Employer. The Chairman cum Managing Director shall appoint at least one out of them as the contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the 3 arbitrators so appointed.

The Chairman cum Managing Director shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contractor's nominees. While nominating the arbitrators it will be necessary to ensure that one of them is from the Accounts Department. An officer of selection grade rank of the Accounts Department of N.Rly (Approved list of N.Rly) shall be considered of equal status to the) J.A grade officer of the other departments of N.Rly for the purpose of appointment of arbitrator.

(a) (iii) The minimum qualifications of Conciliator/ Arbitrator shall be graduate in the respective field. He will be a working officer with a minimum of 20 years service. He should be clear from the vigilance angle and should be a person with reputation of high technical commercial ability and integrity. Also, he should not be associated with the contract to which the dispute pertains."

4. It is not in dispute that notice to commence arbitration in both cases was subsequent to the coming into force of the amended Section 11 read with Section 12 of the Act, i.e. with effect from 23rd October 2015. The said respective notices in both these petitions were issued on 26th July 2016 and 30th August 2016. Consequently, it is not in dispute that the amended provisions will apply to present proceedings.

5. In terms of the aforementioned notices invoking the arbitration clause, on receipt of the notice of invocation, the Respondent sent its replies dated 19th

August 2016 (in Arbitration Petition No. 596 of 2016) and 27th September 2016 (in Arbitration Petition No. 652 of 2016). In these letters, it was stated that the Chairman-cum-Managing Director (CMD) of the Respondent had nominated a panel of four Officers of the Northern Railway for the purpose of constitution and appointment of an Arbitral Tribunal (AT) to adjudicate the disputes between the parties. The panel as set out in the Respondent's reply dated 19th August 2016 is as under:

- “(i) Shri Pankaj Saxena, CE/P&D
- (ii) Shri Shiv Kumar Ex-GM/NF Railway
- (iii) Smt. Bela Banerjee Ex.FA&CAO/Const.
- (iv) Smt. Ambika Jain FA&CAO/W&S.”

6. The panel as set out in the Respondent's reply dated 27th September 2016 is as under:

- “(i) Mr. Pankaj Saxena, CE/P&D/N.Rly
- (ii) Mr. Amit Goel, CE/East, N.Rly
- (iii) Smt. Bela Banerjee Ex.FA&CAO/Const/N.Rly
- (iv) Smt. Ambika Jain FA&CAO/W&S/N.Rly.”

7. Mr. Dayan Krishnan, learned Senior counsel appearing for the Petitioner pointed out that the panel of four persons listed out in the letter dated 19th August 2016 of the Respondent contains two serving employees, i.e., Mr. Pankaj Saxena and Ms. Ambika Jain and two former employees of the Northern Railways (Mr. Shiv Kumar and Ms. Bela Banerjee). As far as reply dated 27th September 2016 in Arbitration Petition No. 652 of 2016 is concerned, it contains three serving employees and one former employee. Relying on the decisions in *Assignia-VIL JV v. Rail Vikas Nigam Limited 230 (2016) DLT 235* and the decision dated 23rd December 2015 in Arbitration Petition No. 521 of 2015 (*Hindustan Construction Company*

Limited v. Ircon International Limited) Mr. Krishnan submitted that this Court should apply the amended Section 11 (8) and 12 (1) read with Section 12 (5) of the Act to hold that neither a serving employee nor a former employee of the Northern Railway should qualify to be an arbitrator in the matter. Mr. Krishnan further submitted that the purpose of the new Section 12 (1) (a) is to disqualify a person as an arbitrator who is “likely to give rise to justifiable doubts as to his independence or impartiality.” He submitted that inasmuch the Respondent is a 100% Government of India undertaking and the Northern Railway is a part of the Government of India, even the former employee of the Northern Railway should be considered as a person who has “any past or present relationship” with the Respondent and therefore, should be disqualified in terms of Section 12 (1) (a) and Seventh Schedule of the Act.

8. Mr. Dinesh Agnani, learned Senior counsel for the Respondent, on the other hand distinguishes the decisions cited by Mr. Krishnan. He pointed out that in **Assignia-VIL JV v. Rail Vikas Nigam Limited** (*supra*) the relevant arbitration Clause 20.3 (iii) (a) therein provided that one member of the Tribunal shall be necessarily be a working or a retired officer of the Indian Railway Accounts Service. It was further provided therein that the Presiding Arbitrator ‘shall necessarily be a serving railway/RVNL Officer” whereas in the present case the relevant clauses are different. As far as the decision in **Hindustan Construction Company Limited v. Ircon International Limited** (*supra*) is concerned, Mr. Agnani pointed out that in the said case the Respondent failed to respond to the notice invoking the arbitration clause whereas in the present case the Respondent, within thirty days of the receipt

of notice, sent the Petitioner a panel of four names. Mr. Agnani submits that there is no disqualification attached to any of the names and each of the persons from the panel has already furnished a declaration in terms of Section 11 (8) read with Section 12 of the Act as amended. Therefore, there is no doubt as to their independence or impartiality.

9. The Court is of the view that the two decisions cited by Mr. Krishnan are clearly distinguishable. In *Assignia-VIL JV v. Rail Vikas Nigam Limited* (*supra*) the arbitration clause 20.3 of the contract therein was different from the clauses in the present case. Further in *Hindustan Construction Company Limited v. Ircon International Limited* (*supra*) there was no response by the Respondent to the notice issued by the Petitioner invoking the arbitration clause.

10. The relevant portions of Section 12 (1) and (5) of the Act 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

.....

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

(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 sub-section by an express agreement in writing.”

11. Entries 1, 2, 5, 9 and 12 of the Seventh Schedule read as under:

“1. The Arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.

2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties

.....

5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.

.....

9. The arbitrator has a close family relationship with one of the parties and in case of companies with the persons in the management and controlling the company.

.....

12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.”

12. While it is not in dispute that the Respondent is a Government of India undertaking which is wholly owned by the Central Government (Ministry of Railways) and incorporated under the Companies Act, 1956, for the purpose of Entry 1 of the Seventh Schedule to attract the disqualification, it must be

shown that the proposed Arbitrator is an employee of the Northern Railway or has any other past or present 'business' relationship with it. The submission of Mr. Krishnan that a former employee of the Northern Railway should be considered as having 'present business relationship' with the Respondent is difficult to accept. In other words, a former employee of the Northern Railway cannot be said to have had a business relationship with the Respondent merely because the Respondent is wholly owned by Government of India/Railways.

13. Mr. Krishnan draws the attention of the Court towards Entry No. 2 of the Seventh Schedule. Entry 2 of the Seventh Schedule attaches disqualification to the Arbitrator where he/she currently represents or advises one of the parties or "an affiliate of one of the parties." Given the fact that the Respondent is wholly owned by the Government of India/Railways and is thus an 'affiliate' organisation, only a presently serving employee of the Northern Railway would stand disqualified, and not a former employee. To hold otherwise, would be adding to the statute a disqualification that has not been made explicit.

14. At this juncture, it is necessary to understand the statutory scheme in terms of the amendments to Sections 11 and 12 of the Act which became operational with effect from 23rd October 2015. While the Fifth Schedule to the Act read with Section 12 (1) (a) provides the instances which give rise to justifiable doubts as to the independence and impartiality of an Arbitrator, the Seventh Schedule read with Section 12 (5) of the Act provides for instances of threshold 'ineligibility' to be appointed as an Arbitrator except

where parties have in writing, after the agreement is entered into, expressly waived the applicability of the provision. The fact that sub-section (5) of Section 12 opens with a non-obstante clause "Notwithstanding any prior agreement to the contrary" underscores the mandatory nature of the provision.

15. As far as the threshold disqualification for being proposed as an Arbitrator is concerned, the Seventh Schedule to the Act appears to draw a conscious distinction between serving and former officials of an organisation. This is evident from a comparison of Entry 1 of the Seventh Schedule on the one hand and Entries 2, 5, 9 and 12 on the other brings out this distinction. Then again, it is not as if any and every person having a present association with an organisation is disqualified. The emphasis seems to be on the position of influence the person has over decision-making in the organisation.

16. Further, even where a Court may at the stage of appointment of an Arbitrator under Section 11 of the Act reject the opposition to such appointment since the grounds under Section 12 read with the Seventh Schedule do not get attracted at that stage, it might be possible for a party, if it is able to come across some other relevant material, to still invoke the challenge procedure *vis-a-vis* such Arbitrator during the pendency of the arbitration. Thus the statute provides the parties a remedy where at any stage of the arbitral proceedings an Arbitrator fails to satisfy the threshold requirement that he has some interest which gives "rise to justifiable doubts as to his independence or impartiality."

17. As far as the instant cases are concerned, it is seen that the panel of four names suggested by the Respondent for the Petitioner in Arbitration Petition No. 596 of 2016 to choose two from, two are serving employees of the Northern Railways. As far as the panel provided in Arbitration Petition No. 652 of 2016, three of them are serving employees of the Northern Railways. If the serving employees are kept out of reckoning, as they should in terms of Sections 11 (8), Section 12 (1) and (5) read with the Seventh Schedule to the Act, it virtually leaves no choice for the Petitioner in either case.

18. Mr. Agnani, learned Senior counsel for the Respondent fairly states that not later than two weeks from today, the Respondent will write to the Petitioner conveying the decision of the CMD providing a panel of four names, in each case, none of whom are serving employees of the Northern Railways. In doing so the CMD of the Respondent will ensure that the criteria spelt out in the Seventh Schedule to the Act is kept in view. The Petitioner will, within the time provided for this purpose in the letter written by the Respondent, choose two of those names and convey its decision to the Respondent. Within ten days of such decision being conveyed, the Respondent will constitute the AT. If for some reason, the above time schedule is not adhered to it will be open to the Petitioner to approach the Court for directions. It is further clarified that this order will not preclude the Petitioner from challenging the AT or any of its members in terms of the procedure provided in the Act if the Petitioner has relevant material, other than the mere fact that they are former officers of the Northern Railway, to substantiate such challenge.

19. The petitions are disposed in the above terms. Order be given *dasti*.

S.MURALIDHAR, J

NOVEMBER 22, 2016

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