

\$~3

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **ARB.P.519/2018**

Date of Decision : 11th December, 2018

SIMPLEX INFRASTRUCTURES LTD. Petitioner
Through: Mr.S.D. Singh, Mr.Jitender
Singh and Mr.Puneet Kr. Jain,
Advs.

versus

RAIL VIKAS NIGAM LIMITED Respondent
Through: Mr.Udit Seth and Mr.Anil Seth,
Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner seeking appointment of a nominee Arbitrator on behalf of the respondent and the Presiding Arbitrator for constitution of the Arbitral Tribunal to adjudicate the disputes that have arisen between the parties in relation to the Agreement dated 28.01.2011 by which the respondent has awarded the work of construction of Viaduct including the related works for 4.748 Km length excluding the station areas from Ch. (-) 1250.00 to Ch.4128.00 between Joka to Behala Chowrasta including the depot approach at Joka, in Joka - BBD bag corridor of Kolkata Metro Railway Line to the petitioner.

2. The Agreement contains an Arbitration Agreement between the parties in form of Clause 17.3 of General Conditions of Contract (GCC) which is reproduced hereinbelow:

“17.3 Any dispute in respect of which amicable settlement has not been reached arising between the Employer and the Domestic of Foreign Contractor related to any matter arising out of or connected with this contract, the disputes shall be settled in accordance with the Indian Arbitration Act, 1996 and any statutory modification or re-enactment thereof. Further, it is agreed between the parties as under:

*(i) **Number of Arbitrators:** The arbitral tribunal shall consist of 3 (three) arbitrators,*

*(ii) **Procedure for appointment of Arbitrators:** The arbitrators shall be appointed as per following procedure:*

(a) Employer will forward a panel of 5 names to the contractor and contractor will give his consent for any one name out of the panel to be appointed as one of the Arbitrators.

(b) Employer will decide the second Arbitrator out of the remaining four names in the panel as mentioned in Para (a) above.

(c) The third Arbitrator shall be chosen by the two Arbitrators so appointed by the parties and shall act as Presiding Arbitrator. In case of failure of the two Arbitrators appointed by the parties to reach upon consensus within a period of 30 days from the appointment of the Arbitrators subsequently appointed, then, upon the request of either or both parties, the presiding Arbitrator shall be appointed by the Managing Director, Rail Vikas Nigam Limited, New Delhi.

*(iii) Qualification and Experience of Arbitrators:
The arbitrators to be appointed shall have minimum qualification and experience as under:*

(a) One member of the tribunal shall be necessarily a working (not below the rank of SAG) or a retired officer (retired not below the rank of SAG, age not exceeding 70 years and in reasonably good mental and physical fitness) of Indian Railway Accounts Service having experience in financial matters related to construction contracts.

(b) One member shall be a technical person having degree in Engineering and may be working (not below the rank of SAG) or retired officer (retired not below the rank of SAG, age not exceeding 70 years and in reasonably good mental and physical fitness) of any Engineering service of Indian Railway or equivalent service in RVNL, and having knowledge and experience of the Railway working.

(c) The Presiding Arbitrator shall necessarily be a serving railway/RVNL officer and he shall have same minimum qualification and experience as specified above for either of the two arbitrators.

(d) Out of 3 Arbitrators not more than one shall be a retired officer.”

3. The disputes having arisen between the parties, the petitioner invoked the Arbitration Agreement vide its letter dated 26.12.2017. In the said letter, the petitioner *inter-alia* relying upon the judgment of the Supreme Court in **Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation**, (2017) 4 SCC 665 and of this Court in **Afcons Infrastructure Pvt. Ltd. v. Rail Vikas Nigam Limited**, 2017 SCC

OnLine Del 8675 contended that the procedure for appointment of the Arbitral Tribunal as provided in Clause 17.3 (ii) would no longer be valid and therefore, nominated its own Arbitrator.

4. The respondent, in turn, insisted upon the procedure prescribed in Clause 17.3(ii) of the Agreement between the parties, and vide its letter dated 19.01.2018 forwarded a list of five persons for the petitioner to choose its nominee Arbitrator from. A perusal of the list would show that all the names suggested by the respondent were retired officials from the Railways or other Companies which fall within the umbrella of Indian Railways like IRCON and CRIS.

5. The petitioner vide its letter dated 22.02.2018 again protested against the panel and reiterated its nomination of an Arbitrator. The respondent, however, vide its letter dated 17.05.2018 again called upon the petitioner to choose one name out of the panel of five names forwarded by it in its earlier communication as petitioner's nominee Arbitrator.

6. Learned counsel for the petitioner submits that Clause 17.3 (ii) of the GCC is no longer applicable and for this purpose he places reliance on the judgment of this Court in ***Afcons Infrastructure*** (supra) wherein this Court had held as under:

"32. This court is of the view that it would be in the interest of securing an independent and impartial arbitral tribunal if the procedure under clause 17.3(ii) is disregarded. This is, essentially, for three reasons. First, the decision of the Supreme Court that the procedure that limits the party's choice to select only

one out of the five persons suggested by the other party has “adverse consequences” and needs to be countenanced.

33. Second, that RVNL has only suggested the names of former employees of Railways/RVNL for appointment of an arbitrator. Thus, all persons have a past relationship (however remote) with RVNL/Railways. Such relationship may not fall within the rigour of Section 12(5) of the Act read with the Seventh Schedule to the Act, but undeniably does give rise to apprehensions (whether justifiable or not) in the minds of the other party. It is essential that all parties have full confidence with the arbitral process.

34. And third, the General Manager does wield the power to remove the arbitrator from panel if it appears to him that the arbitrator is unfair; thus depriving him of further work.”

7. On the other hand, learned counsel for the respondent submits that the present petition is not maintainable inasmuch as the petitioner has failed to follow the procedure prescribed in Clause 17.2 of the GCC which requires the parties to make attempts to settle the disputes amicably before commencement of Arbitration. He submits that in the present case, the petitioner has made no such attempt to amicably settle the disputes and has proceeded to invoke the Arbitration Agreement in breach of such procedure. He places reliance on the judgment of this Court in ***Ved Prakash Mithal & Sons v. Delhi Development Authority***, 2018 SCC OnLine Del 9884 to contend that where the procedure prescribed is not followed, the petition under Section 11 of the Act would not be maintainable.

8. He further submits that in any case, the petitioner could not have nominated its own Arbitrator as it has sought to do by the letter dated 26.12.2017. The petitioner having not followed the Arbitration procedure with respect to the appointment of its nominee arbitrator, the present petition is liable to be dismissed.

9. I have heard the submissions made by the counsels for the parties. At the outset, it must be noted that in spite of the judgment of the Supreme Court in **Voestalpine Schienen GMBH** (supra), the respondent is still insisting on giving five names only for the petitioner to make the selection of its nominee Arbitrator. This procedure was commented upon by this Court in its judgment in **Bernard Ingenieure ZT-GMBH v. Ircon International Ltd.**, 2018 SCC OnLine Del 7944 and thereafter in the cases involving the respondent itself in **Larsen & Tourbro Ltd. v. Rail Vikas Nigam Ltd.**, 2018 SCC OnLine Del 9176 and **NCCL-Premco (JV) v. Rail Vikas Nigam Limited**, 2018 SCC OnLine Del 11926.

10. In **Bernard Ingenieure** (supra), this Court while considering a similar clause in the Agreement has held as under:

“11. The above judgment was passed by the Supreme Court as far back, as 10th February, 2017. More than a year has passed, however, even now the so-called broadbased panel of the respondent still does not contain names of Engineers of prominence and high repute from private sector, persons with legal background like Judges and lawyers of repute, people having knowledge and expertise in accountancy etc. The panel of Arbitrators now framed by the respondent is, therefore, in my opinion, still not in conformity with the judgment of the Supreme Court in Voestalpine Schienen GMBH(supra) and,

therefore, in my opinion, the respondent has failed to act in accordance with the procedure prescribed under the arbitration agreement between the parties. It is again emphasised that even the Supreme Court in the above judgment had suggested, if not directed, that a clause in the arbitration agreement restricting the right of the contracting party to appoint/nominate his own Arbitrator should be deleted.”

11. Subsequently, in **Larsen & Tourbro**(supra), this Court while considering the issue of the respondent forwarding only a list of five persons for the petitioner to choose its nominee arbitrator from, has held as under:

“10. Following the reasoning given by this Court in Bernard Ingenieure ZT – GMBH (supra), in my opinion, in the present case also, as the respondent has forwarded only a list of five persons to the petitioner, from which it has called upon the petitioner to choose one Arbitrator as its nominee, the respondent has failed to discharge the obligations that have been cast upon it under the Arbitration Agreement read with Section 12 of the Amended Act and is therefore, deemed to have fortified its right under the said Agreement.”

12. In **NCCL-Premco** (supra), this Court further reiterated as under:

*“.....As noted above, this Court in **Larsen & Toubro Ltd.** (supra) in similarly situated facts had held that mere forwarding of a list of five persons (in that case) would be a failure of the respondent to discharge its obligations that have been cast upon it under the Arbitration Agreement read with Section 12 of the Amended Act as also the Judgment of the Supreme Court in **Voestalpine Schienen** (supra).*

*11. As in spite of the judgment of the Supreme Court in **Voestalpine Schienen** (supra) and of this Court in **Larsen & Toubro Ltd.** (supra), the respondent insisted on giving only a limited number of names from its panel of Arbitrators to the*

petitioner for choosing its nominee Arbitrator, the same clearly amounts to a failure on part of the respondent to act in accordance with the Arbitration Agreement read with Section 12 of the Amended Act.

*12. Even the panel of Arbitrators that has been framed by the respondent and has been offered by it to the petitioner alongwith its reply to the present petition, in my opinion, does not conform to the Judgment of the Supreme Court in **Voestalpine Schienen** (supra) inasmuch as it still does not include Engineers of prominence and high repute from private sector, persons with legal background like Judges and lawyers of repute or people having knowledge in accountancy, i.e. Chartered Accountant, etc. The panel is still predominately of former employees with the Railways and Public Sector Companies connected thereto.*

13. Be that as it may, as the respondent had failed to discharge its obligations in terms of the Arbitration Agreement read with Section 12 of the Act, the appointment of the nominee Arbitrator of the petitioner is confirmed.”

13. As noted in the above judgments, this Court has held that the respondent cannot insist upon the procedure prescribed in Clauses similar to Clause 17.3 (ii) of the Agreement by forwarding only a panel of five names for the other contracting party to choose its nominee Arbitrator from. This procedure is no longer valid and the respondent must broad base its panel of Arbitrators by including names of Engineers of prominence and high repute from the private sector, persons with legal background like Judges and lawyers of repute, people having knowledge and expertise in accountancy etc.

14. In spite of the position of law explained by the Supreme Court in *Voestalpinen Schienen GMBH* (supra), the respondent insists on the petitioner to choose its nominee Arbitrator from the panel of five names forwarded by it. As noted above, the five names forwarded by the respondent are either from Railways or from IRCON/CRIS, that is, companies falling under the umbrella of Indian Railways just like respondent. This has also been frowned upon by this Court in *Afcons Infrastructure* (supra).

15. The respondent in its reply has now forwarded a complete so called broad-based panel of Arbitrators prepared by it. The same has 26 names with only nine being officers who are not connected with the Railways or other railway organizations/companies. In this panel there is no person with any legal background or with background of accountancy and other fields. Clearly, in spite of repeated judgments of this Court relying upon the judgment of the Supreme Court in *Voestalpine Schienen GMBH* (supra), the respondent has blatantly refused to comprehensively broad base its panel of Arbitrators.

16. As far as the contention of the counsel for the respondent that the petition is not maintainable because the petitioner had not made any attempt for an amicable settlement of the disputes before invoking the arbitration, it may only be stated to be rejected. By its very conduct the respondent has waived such condition. The respondent as noted above, in its response to the letter invoking arbitration did not call upon the petitioner to first resolve the disputes through amicable settlement. On the other hand, the respondent proceeded to not only

forward the names of five persons to the petitioner to choose its nominee Arbitrator from but also insisted upon the same in spite of protest by the petitioner. Therefore, this clearly is an afterthought and an attempt by the respondent to now justify the non following of the judgments of this Court as discussed above.

17. As far as the plea of the respondent that the petitioner had proceeded to nominate its own Arbitrator without following the procedure prescribed in Clause 17.3 (ii) is concerned, I may have found some merit in the said contention only if it was the case of the respondent that the respondent had actually followed the judgment of the Supreme Court in *Voestalpine Schienen GMBH* (supra) and broad-based its panel of Arbitrators and forwarded such panel of Arbitrators to the petitioner. This having not been done, the petitioner was within its right to nominate its Arbitrator, if not by the letter dated 26.12.2017, then by subsequent letters dated 22.02.2018 and 18.04.2018.

18. In view of the above, I see no impediment in appointing a nominee Arbitrator on behalf of the respondent. I nominate **Hon'ble Mr. Justice Swatanter Kumar**, Retired Judge of the Supreme Court (C-3/5, 1st Floor, Safdarjung Development Area, Near Aurobindo Market, New Delhi, Mobile-9560413636) as nominee Arbitrator on behalf of the respondent. The two Arbitrators shall give disclosure statement in terms of Section 12 of the Act before proceeding with the reference. The two Arbitrators shall also thereafter proceed to appoint the Presiding Arbitrator preferably within a period of three weeks

from the communication of this order. The Arbitrator shall be paid fee as per Fourth Schedule to the Act.

19. The petition is allowed in the above terms with cost of Rs.25,000/- to be paid by the respondent to the petitioner for the present petition.

NAVIN CHAWLA, J

DECEMBER 11, 2018/Arya

