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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 10th May, 2018

+ ARB. P. 335/2017

LARSEN & TOUBRO LIMITED Petitioner
Through: Mr.Manu Seshadri & Mr.Ishan Bisht,
Advs.

versus

RAIL VIKAS NIGAM LIMITED Respondent
Through: Mr.Udit Seth, Adv

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 11 of the Arbitration and Conciliation Act, 1996 has been filed by the petitioner seeking appointment of an Arbitrator on behalf of the respondent for adjudicating the disputes that have arisen between the parties in relation to the contract dated 15.12.2011 for the Work of Package ANV4 - "Construction of Viaduct including related works for 5.40 km length excluding station areas from Ch. 20006.60 to Ch. 26394.60 between CBD-1 to Rabindra Tirthain Newgaria-Airport Corridor of Kolkata Metro Railway Line".
2. The contract between the parties contains an arbitration agreement in the form of Clause 17.3 thereof, which is reproduced herein under:-

“17.3 Arbitration

Any dispute in respect of which amicable settlement has not been reached arising between the Employer and the Domestic or 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 Railways 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.

- (iv) No person other than the persons appointed as per above procedure and having above qualification and experience shall act as arbitrator.*
- (v) Neither party shall be limited in the proceedings before such arbitrators to the evidence nor did arguments previously put before.*
- (vi) The reference to arbitration may proceed, notwithstanding that the Works shall not then be or be alleged to be complete, provided always that the obligations of the Employer, the Engineer and the Contractor shall not be altered by the reason of the arbitration being conducted during the progress of the Works. Neither party shall be entitled to suspend the Works, nor shall payment to the Contractor be continued to be made as provided by the Contract.*
- (vii) Arbitration proceedings shall be held at New Delhi, India and the language of the arbitration proceedings and that of all documents and communications between the parties shall be in English.*
- (viii) The decision of the majority of arbitrators shall be final and binding upon both parties. The expenses of the conciliators/arbitrators shall be as per the scales fixed by the employer from time to time and shall be shared equally by the Employer and the Contractor. However, the expenses incurred by each party in connection with the preparation, presentation will be borne by itself.*
- (ix) All arbitration awards shall be in writing and shall state the reasons for the award.*

However, in case the contractor is a Public Sector Enterprise/Govt. Department, the dispute arising between the 'Employer' and the 'Contractor' shall be settled through Permanent Arbitration Machinery (PMA) of the Department of Public Enterprise, Govt. of India as per prevailing rules, as stated in Sub-Clause 17.3. "

3. The disputes having arisen (for the sake of convenience referred to as Series 1 claims) were referred to an Arbitral Tribunal by the respondent vide letter dated 22.07.2013. As further disputes arose between the parties (for the sake of convenience referred to as Series 2 claims), the same were again

referred to the same Arbitral Tribunal by the respondent vide letter dated 19.05.2016. The said reference has been challenged by the petitioner by way of OMP (T) (COMM) 38/2017 which is pending adjudication before this Court.

4. As further disputes arose between the parties (for the sake of convenience referred to as Series 3 claims), the petitioner sought reference of the same to arbitration vide its letter dated 07.11.2016. The respondent, vide its letter dated 16.11.2016 agreed to refer the Series 2 claims of the petitioner to Arbitral Tribunal. By another letter dated 05.12.2016 the respondent stated that Series 3 claims will be referred to a separate Arbitration Panel and accordingly, vide its letter dated 10.01.2017 forwarded names of 5 persons as the panel from which it called upon the petitioner to choose one as its Arbitrator. A perusal of the list of persons forwarded by the respondent would show that they were all former employees of companies under the umbrella of Indian Railways.

5. The petitioner did not agree to such a panel and therefore filed the present petition under Section 11 of the Act.

6. The learned counsel for the petitioner submits that Clause 17.3 of the Agreement, so far as it restricts the right of the petitioner to choose its Arbitrator only from the panel forwarded by the respondent, would no longer be valid in view of the amendment to Section 12 of the Act. Further relying upon the judgment of the Supreme Court in ***Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation***, (2017) 4 SCC 665, it is submitted that the Supreme Court has held that keeping in view the spirit of the amended provisions and in order to instill confidence in the minds of the parties, it is imperative that the panel should be broadbased and should

comprise of persons with legal background like Judges and lawyers or reputed people with the knowledge of accountancy etc. He submits that though this judgment was passed on 10.02.2017, however, the respondent has still not complied with the said directions and its panel of Arbitrators is still confined to only 16 persons who are mostly the employees of companies under the Indian Railways. He further submits that Clause 17.3(iii) can no longer be enforced in light of the amendment to the Act. The counsel for the petitioner has further relied upon the judgment of this Court in **Bernard Ingenieure ZT – GMBH v. Ircon International Ltd.**, 2018 SCC Online Del 7941, to submit that in the case of Ircon International Ltd. on a similar ground, this Court 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.”

7. The counsel for the respondent relying upon the judgment of Madras High Court in **Offshore Infrastructure Limited v. Bharat Heavy Electricals Limited Power section & Anr.**, 2016 SCC Online Mad 31837 submits that

the justifiable doubt as to independence or impartiality of an Arbitral Tribunal under Entry 31 of the Fifth Schedule would arise in the case of an ex-employee only if he is within the window of three years from the date of ceasing to be an employee. In my opinion, the said judgment can be of no assistance to the respondent inasmuch as the Court is not judging whether, against the persons named in the panel, there would be a case of justifiable doubt as to their independence or impartiality as mentioned in Section 12 of the Act, made out or not. The question which is being determined is, whether the respondent can restrict the right of the petitioner only to five names who were ex-employees or were in any manner connected to the respondent or its sister company.

8. The counsel for the respondent has further relied upon the judgment of this Court in ***HCL Infotech Limited v. Mahanagar Telephone Nigam Limited***, 2017 SCC OnLine Del 6915, to submit that a retired employee of the Government of India would not be ineligible under Section 12(5) of the Act for being appointed as an Arbitrator. As noted above, this is not the issue in the present case and therefore, the above judgment is not applicable to the facts of the present case.

9. In ***Voestalpine Schienen GMBH*** (supra), the Supreme Court, considering a similar Arbitration Agreement in the case of Delhi Metro Rail Corporation Ltd., has held as under:-

“28. Before we part with, we deem it necessary to make certain comments on the procedure contained in the arbitration agreement for constituting the Arbitral Tribunal. Even when there are a number of persons empanelled, discretion is with DMRC to pick five persons therefrom and forward their names to the other side which is to select one of these five persons as its nominee (though in this case, it is now done away with). Not only this, DMRC is also to nominate its

arbitrator from the said list. Above all, the two arbitrators have also limited choice of picking upon the third arbitrator from the very said list i.e. from remaining three persons. This procedure has two adverse consequences. In the first place, the choice given to the opposite party is limited as it has to choose one out of the five names that are forwarded by the other side. There is no free choice to nominate a person out of the entire panel prepared by DMRC. Secondly, with the discretion given to DMRC to choose five persons, a room for suspicion is created in the mind of the other side that DMRC may have picked up its own favourites. Such a situation has to be countenanced. We are, therefore, of the opinion that sub-clauses (b) & (c) of Clause 9.2 of SCC need to be deleted and instead choice should be given to the parties to nominate any person from the entire panel of arbitrators. Likewise, the two arbitrators nominated by the parties should be given full freedom to choose third arbitrator from the whole panel.

29. Some comments are also needed on the Clause 9.2(a) of the GCC/SCC, as per which the DMRC prepares the panel of “serving or retired engineers of government departments or public sector undertakings”. It is not understood as to why the panel has to be limited to the aforesaid category of persons. Keeping in view the spirit of the amended provision and in order to instill confidence in the mind of the other party, it is imperative that panel should be broad based. Apart from serving or retired engineers of government departments and public sector undertakings, engineers of prominence and high repute from private sector should also be included. Likewise panel should comprise of persons with legal background like Judges and lawyers of repute as it is not necessary that all disputes that arise, would be of technical nature. There can be disputes involving purely or substantially legal issues, that too, complicated in nature. Likewise, some disputes may have the dimension of accountancy, etc. Therefore, it would also be appropriate to include persons from this field as well.

30. Time has come to send positive signals to the international business community, in order to create healthy arbitration environment and conducive arbitration culture in this country. Further, as highlighted by the Law Commission also in its report, duty becomes more onerous in Government contracts, where one of

the parties to the dispute is the Government or public sector undertaking itself and the authority to appoint the arbitrator rests with it. In the instant case also, though choice is given by DMRC to the opposite party but it is limited to choose an arbitrator from the panel prepared by the DMRC. It, therefore, becomes imperative to have a much broad based panel, so that there is no misapprehension that principle of impartiality and independence would be discarded at any stage of the proceedings, specially at the stage of constitution of the arbitral tribunal. We, therefore, direct that DMRC shall prepare a broad based panel on the aforesaid lines, within a period of two months from today.”

(emphasis supplied)

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 forfeited its right under the said Agreement.

11. Learned counsel for the petitioner submits that the petitioner has already appointed **Justice Mukul Mudgal**, Former Chief Justice of Punjab and Haryana High Court (R/o A-1, 2nd Floor, Nizamuddin East, New Delhi-110013, Mobile: 9818000250) as its nominee Arbitrator. As the respondent has failed to appoint its nominee Arbitrator, I appoint Mr. Sudhir Nath, Retd. Director (Finance) / IRCON as a nominee Arbitrator on behalf of the respondent. The two Arbitrators shall give their disclosure statements under Section 12 of the Act before proceeding with the reference. They shall further decide on the third Arbitrator so as to complete the constitution of

the Arbitral Tribunal.

12. The petition is disposed of with the above directions and with no order as to cost.

NAVIN CHAWLA, J

MAY 10, 2018/rv