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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 17th May, 2018

+ O.M.P. (T) (COMM.) 86/2017
C & C CONSTRUCTION LTD Petitioner
Through: Mr.S.K. Maniktala & Mr.Tushar
Chawla, Advs.

versus

IRCON INTERNATIONAL LTD Respondent
Through: Ms.Monisha Handa & Mr.Mohit D.
Ram, Advs.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 14 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner seeking termination of the mandate of the Arbitral Tribunal that has been constituted by the respondent to adjudicate the disputes that have arisen between the parties in relation to the work of construction of Railway Over Bridge at five places namely, (i) Dadi Ka Phatak (LC-89), (ii) Khirni Ka Phatak (LC-228), (iii) Bindayaka (LC-233), (iv) Bassi (LC-200) and (v) Reengus (LC- 108) in Jaipur, Rajasthan awarded in favour of the petitioner under Letter of Award dated 16.05.2012.
2. The Arbitration Agreement between the parties is contained in Clause 73 of the Agreement. Clause 73.4(a)(ii) is relevant for the present petition and is reproduced herein under:-

“73.4(a)(ii) Arbitration Tribunal

In cases where the total value of all claims / counter claims exceeds Rs.2.00 (Two) crore, the Arbitral tribunal shall consist of a panel of three officers not below GM level.

For this purpose, the employer will send a panel of more than three names to the contractor, within 60(Sixty) 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 managing Director at least two names out of the panel for appointment as contractor's nominee within thirty days from the date of dispatch of the request by the employer. The Managing Director shall appoint at least one out of them as the contractor's nominee and will, also simultaneously appoint the balance no. of arbitrators either from the panel or from outside the panel, duly indicated the "presiding Arbitrator" from amongst the three arbitrators so appointed. The Managing-Director, shall complete this exercise of appointing the arbitral tribunal within 30 days from the receipt of the names of contractor's nominee. While nominating the arbitrators, it will be necessary to ensure that one of them is from accounts department. An officer of AGM rank of the accounts department shall be considered of equal status to the GM of the other department of the IRCON for the purpose of appointment of arbitrator."

3. The Arbitration Agreement provides that upon a request received from the petitioner, the respondent would send a panel of more than three names to the Contractor/petitioner to choose its nominee Arbitrator. The Contractor/petitioner would choose two names out of the panel and it would be the Managing Director of the respondent who would finally appoint the nominee Arbitrator of the Contractor/petitioner from the two names suggested by it. Factually therefore, it is the Managing Director who appoints the nominee Arbitrator for the Contractor. The Managing Director is also empowered to appoint the remaining two arbitraors, including the Presiding Arbitrator and therefore, a holistic reading of the Arbitration Agreement between the parties would suggest that it is only the respondent

which is empowered to appoint the Arbitral Tribunal, though giving an impression of choice to the Contractor to appoint its own nominee Arbitrator.

4. In the present case, upon a request dated 25.01.2017 received from the petitioner, the respondent vide its letter dated 14.02.2017 forwarded a panel of four names to the petitioner for choosing its nominee Arbitrator. The petitioner, while protesting against the procedure stipulated in Clause 73.4(a)(ii) and contending that the same would no longer be valid after the Arbitration and Conciliation (Amendment) Act, 2015, gave two names from the panel forwarded by the respondent. The respondent, however, ignored the challenge made by the petitioner and constituted the Arbitral Tribunal.

5. The petitioner again challenged the appointment of the Arbitral Tribunal by moving an application under Section 13(2) of the Act before the Arbitral Tribunal. The counsel for the petitioner submits that this application was heard by the Arbitral Tribunal on 04.06.2017; it is only after the hearing had concluded that the Presiding Arbitrator submitted a fresh disclosure statement under Section 12 of the Act dated 06.06.2017 *inter alia* disclosing that he had been appointed as an Independent External Monitor (IEM) for the respondent in consultation with the Central Vigilance Commission (CVC) since 09.05.2014. The learned counsel for the petitioner submits that in view of such disclosure, the Presiding Arbitrator was ineligible for being appointed as an Arbitrator in terms of Section 12(5) of the Act read with Entry 1 of the Seventh Schedule, as he was in his capacity as an IEM, an adviser to the respondent organisation.

6. The learned counsel for the petitioner further submits that Mr. Bhuvnesh P. Khare, GM/ Rly. (Retd.) who had been appointed as a

nominee Arbitrator by the respondent, was also an officer working with the Indian Railways till 2014 and in his entire career has worked in different capacities with the Indian Railways and therefore, was ineligible for being appointed as an Arbitrator. In this regard he has placed reliance on the judgment dated 29.05.2017 passed by this Court in ARB. P. 21/2017, ***Afcons Infrastructure Ltd. v. Rail Vikas Nigam Limited***, wherein this Court, while dealing with the case involving Rail Vikas Nigam Limited, has held as under:-

“16. Indisputably, Railways exercise a pervasive control in respect of the affairs of RVNL. RVNL was established as a "Special Purpose Vehicle" to undertake project development, mobilization of financial resources and implementation of projects pertaining to strengthening of Golden Quadrilateral & Diagonals, Port Connectivity and other railway infrastructure projects. The expression "Special Purpose Vehicle" only indicates that RVNL has been created to undertake a specified function of the Railways. The organisation structure of the Railways as available on the official website of the Ministry of Railways, Government of India clearly indicates that the Railway Board is directly in-charge of various other units including RVNL and certain other PSUs. The projects undertaken by RVNL are for the Railways and are in terms of the budget allocations provided by the Railways. The projects after being executed are also handed over to the concerned railway departments.

17. Article 66 of the Articles of Association of RVNL empower the President of India to appoint all directors including Full Time Chairman, Managing Director, other Directors, part time Directors, and Government Directors (in other words, all directors) on the Board of RVNL. It is also specified that the Directors appointed would hold office until removed. Thus, the Ministry of Railways has full control over appointment and removal of the Directors of RVNL. In terms of Article 67 of the Articles of Association of RVNL, the Board of Directors is to manage the affairs of RVNL subject to the directives issued by the President from time to time.

18. *The Senior Management of RVNL are also officers from the various services of the Indian Railways. The profile of the Board of Directors of RVNL as downloaded from its website indicates that the Chairman and the Managing Director as well as the Director Projects are from the cadres of the Indian Railways Service of Engineers. The Director (Personnel) is from Indian Railways Personnel Service and the Director (Operations) is from Indian Railway Traffic Service. It is, thus, seen that the Management of RVNL are/were also officers to the Railways. Although, RVNL has a cadre of its own, but the majority of its cadre is also drawn from the employees of the Railways. Afcons has also produced Office Orders issued by Ministry of Railways granting non-functional upgradation to various officers in the Railways which include officers serving in RVNL, thus, indicating that the service conditions of the employees of RVNL sent on deputation are also managed by the Railways.*

19. *RVNL is also a "railway administration" under the provisions of the Railways Act, 1989. Keeping the totality of circumstances in view, it would be very difficult to accept that RVNL should not be considered as an arm of the Indian Railways.*

20. *Thus, the issue whether former employees of the Railways could be appointed as arbitrators has to be considered in the aforesaid context. Keeping in view the objective of Section 12 of the Act read with the Fifth and the Seventh Schedule to the Act, no distinction can be drawn between former employees of RVNL and former employees of the Railways.*

7. The learned counsel for the petitioner further places reliance on the judgment of the Supreme Court in ***Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Limited***, (2017) 4 SCC 665, to submit that the Supreme Court has held that similar Arbitration Agreements need to be deleted and instead choice should be given to the parties to choose any person from the entire panel, and such a panel should be broadbased and consist of persons from the legal background as also from other fields like accountancy etc. He submits that in the present case only four names have

been forwarded to the petitioner to make a choice of its nominee Arbitrator and two of these were former employees of the respondent itself.

8. On the other hand the counsel for the respondent submits that the petitioner having challenged the Arbitral Tribunal by moving an application under Section 13 of the Act and the Arbitral Tribunal having rejected such challenge, the petitioner can now challenge the Arbitral Tribunal only if it is aggrieved with the final award passed by such Arbitral Tribunal. She submits that the application under Section 14 of the Act would not be maintainable for making such challenge to the Arbitral Tribunal at this stage. It is her submission that Section 14 would be applicable only where, after the constitution of the Arbitral Tribunal, one or more of the Arbitrators “become” ineligible/*de jure* or *de facto* unable to perform his/their functions. She submits that this was not the case in the present facts as there is no allegation that after the constitution of the Arbitral Tribunal the Arbitrator(s) has suffered any ineligibility. She further submits that merely because one of the Arbitrators is an ex-employee of the Indian Railways, this would not act as an ineligibility against such Arbitrator. She further submits that as far as the Presiding Arbitrator is concerned, IEMs are appointed in consultation with the CVC and are independent of the organisation; in any case, in the present factual position, the Presiding Arbitrator has clearly disclosed that since his appointment he has not received any assignment from the respondent, nor has he been paid any remuneration by the respondent. She submits that therefore, the Presiding Arbitrator would also not be ineligible under Section 12(5) of the Act, to act as an Arbitrator. She submits that in fact, the petitioner had agreed to the constitution of the Arbitral Tribunal and is now challenging the same as an afterthought.

9. I have considered the submissions made by the parties. One aspect which is certain and cannot be disputed is that the Supreme Court in *Voestalpine Schienen GMBH* (Supra) has clearly held that similar Arbitration Agreements which provide for a panel of names to be forwarded by one of the contracting parties to the other to choose its nominee Arbitrator have adverse consequences. The Supreme Court has further held that such Clause(s) need to be deleted and instead choice should be given to the parties to nominate any person from the entire panel of Arbitrators. The Supreme Court has further directed that such panel of Arbitrators should not be limited to the serving or retired officers of the organisation but keeping in view the spirit of the amended provisions and in order to instill confidence in the minds of the other parties, it is imperative that the panel should be broadbased. The panel should include people from legal background and people having expertise in different fields like accountancy etc. The Supreme Court in that case had directed the DMRC to prepare a broadbased panel within a period of two weeks from the date of that order. I may only further note that in that case, the DMRC had eventually forwarded a list of 31 persons on its panel to the Contractor to choose its nominee Arbitrator.

10. In *Afcons Infrastructure Ltd.* (Supra) this Court has again considered the effect of the above judgment in relation to Rail Vikas Nigam limited and has held that the procedure that limits the parties to select its nominee Arbitrator only from five persons suggested by the other party has adverse consequences and the Court may disregard the agreed procedure to secure the appointment of an impartial Arbitrator.

11. In the present case, the Presiding Arbitrator in his initial disclosure did not disclose his association with the respondent and his appointment as

an IEM with the respondent. The said fact was disclosed only after hearing the application of the petitioner challenging the appointment of the Arbitral Tribunal. This itself casts a doubt on the impartiality of the Presiding Arbitrator and his continuation as a Presiding Arbitrator.

12. In any case, the Presiding Arbitrator was appointed as an IEM by the respondent organisation. A perusal of the Standard Operating Procedures issued by the CVC suggests that the IEM has been given roles and duties which *inter alia* include advising the organisation on issues raised by the intending bidders regarding Integrity Pact in the tender, conducting meetings with the Chief Executive of the organisation on quarterly basis, examining complaints received by them and giving their recommendations and views to different executives of the organisation etc. This would certainly make the Presiding Arbitrator ineligible under Section 12(5) of the Act read with Entry 1 of the Seventh Schedule to act as an Arbitrator.

13. The proviso to Section 12(5) of the Act provides that parties may waive the objections of ineligibility of an Arbitrator, however, it can only be subsequent to the disputes having arisen and by way of an 'express Agreement in writing'. In the present case the petitioner has been repeatedly challenging the appointment of the Arbitral Tribunal and therefore, it cannot be said that the petitioner, in any manner, expressly agreed to waive the ineligibility of the Presiding Arbitrator. Also the mere fact that the Presiding Arbitrator did not get any assignment from the respondent or was not in receipt of any remuneration by the respondent, in my opinion, cannot wash away the ineligibility suffered by the Presiding Arbitrator due to his appointment as an IEM by the respondent.

14. As far as the objection of the petitioner against the appointment of Mr. Bhuvnesh P. Khare, GM/ Rly. (Retd.) nominee Arbitrator of the respondent is concerned, it is not the case of the petitioner that he is a serving employee of the respondent organisation. In ***Afcons Infrastructure Ltd.*** (Supra) this Court had held that merely because the person is an ex-employee of the Indian Railways, such Arbitrator cannot be considered as being ineligible under Section 12(5) of the Act read with the Seventh Schedule. In ***Voestalpine Schienen GMBH*** (Supra), the Supreme Court has held that merely because a person has been an ex-government Employee, such person cannot be considered as being ineligible for appointment as an Arbitrator. In ***HRD Corporation (Marcus Oil And Chemical Division) V. Gail (India) Limited (Formerly Gas Authority of India Ltd.)***, 2017 SCC OnLine SC 1024, the Supreme Court has further clarified that if an objection against the Arbitrator is based on the Fifth Schedule of the Act, the party must follow the procedure as prescribed under Section 13(5) of the Act and a petition under Section 14 would not be maintainable in that regard. Therefore, as far as Mr. Bhuvnesh P. Khare, GM/ Rly. (Retd.) is concerned, the petitioner would be at liberty to challenge his appointment at an appropriate stage, if so required.

15. In view of the above, the appointment of the nominee Arbitrator for the petitioner, namely Mr. Ashok Khurana - D.G. / CPWD (Retd.), and the Presiding Arbitrator, namely Mr. Rajendra Kumar Goyal, AM(Planning), Rly.Brd.(Retd.), cannot be sustained and their mandate to act as an Arbitrator and the Presiding Arbitrator respectively, is terminated.

16. The counsel for the petitioner submits that Mr. M.K. Aggarwal, Ex-Chief Engineer to PWD B&R Govt. of Haryana, shall be appointed as a

nominee Arbitrator for the petitioner. He shall give his disclosure under Section 12 of the Act before proceeding with the reference.

17. As far as the Presiding Arbitrator is concerned, the two nominee Arbitrators can decide on the same in accordance with Section 11(3) of the Act.

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

NAVIN CHAWLA, J

MAY 17, 2018/rv