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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ O.M.P. (T) (COMM.) 127/2018

ERA INFRA ENGINEERING LIMITED Petitioner
Through Mr. Nishant Menon, Mr. Abhishek
Birthray and Mr. Prateek Seth, Advs.

versus

BHARTIYA RAIL BIJLEE COMPANY LIMITED..... Respondent
Through Mr. Vaibhav Dabas, Adv.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER

ORDER

% **26.02.2019**

1. This is a petition filed under Sections 14 and 11 of the Arbitration and Conciliation Act, 1996 (for short '1996 Act').
2. To be noted, this petition has been filed by, one, Mr. Abhishek Kapoor, who claims that he has been duly authorised by the Insolvency Resolution Professional (IRP) vide a Special Power of Attorney dated 12.10.2018 (in short 'SPA') to act on behalf of the Petitioner.
3. Notice in this petition was issued on 4.12.2018. On return of notice, Mr. Vaibhav Dabas, Advocate, has entered appearance on behalf of the respondent.
- 3.1 Learned counsel says he does not wish to file reply and that he will argue the matter based on the record as it presently subsists. The

substantive prayers made in the petition is as follows: -

a) Allow the present Petition and declare the mandate of Shri C Siva Kumar as the sole arbitrator in respect of arbitration proceedings between the Parties is terminated;

b) Appoint a substitute sole arbitrator to adjudicate all the disputes and differences between the parties arising out of the Contract dated 25.01.2010.”

4. Mr. Menon, who, appears for the petitioner, says that the IRP was appointed by the NCLT vide order dated 08.05.2018. This fact is reflected in the aforementioned SPA.

4.1 Learned Counsel says that despite triggering the arbitration agreement and calling upon the Chairperson of the respondent to appoint an Arbitrator, there has been no movement in the matter.

5. It is, *inter alia*, averred in the petition that Mr. C. Siva Kumar i.e. the incumbent Arbitrator, at the time of his appointment, was employed as the General Manager (Projects) with the respondent. It is also averred that Mr. C. Siva Kumar was the controlling authority in respect of the subject contract.

6. In other words, it is the petitioner's assertions that day-to-day dealings and decisions qua the subject contract were taken by Mr. C. Siva Kumar. The petitioner further states that at present Mr. C. Siva Kumar is acting as the Chief Executive Officer of the respondent. Besides this, it is also asserted that Mr. C. Siva Kumar has not made a disclosure as required under Section 12 of the 1996 Act.

7. It is in this context that the petitioner vide communication dated 11.10.2018 had called upon the Chairman of the respondent to appoint an independent and impartial Arbitrator by providing to it a panel of 5 names consisting of former Judges of the High Court and/or Supreme Court to enable it to choose one of them as the Sole Arbitrator.

7.1 It appears that no response was received to the said communication from the respondent.

8. It is in these circumstances that the petitioner was compelled to move this Court via the instant petition.

9. Faced with this situation, Mr. Dabas, who appears for the respondent, submits that many assertions made in the petition, *albeit*, on merits are not correct.

10. To my mind, at this juncture, I am not required to examine the merits of the matter and the assertions made in that behalf. Given the fact that the appointment of Mr. C. Siva Kumar is not disputed, in my opinion, the relief sought by the petitioner would have to be granted for the following short reasons, there being no traverse on record. It is not denied that Mr. C. Siva Kumar was concerned with the subject contract and is, presently, the CEO of the respondent. Clearly, in these circumstances Mr. C. Siva Kumar cannot act as an Arbitrator as his appointment violates, so to speak, the first commandment for arbitrators which is, that they shall not appear to be biased.

11. Consequently, the prayers made in the petition are allowed.

11.1 Accordingly, Mr. C. Siva Kumar will stand substituted by

Hon'ble Mr. Justice Jagannadha Rao, former Judge, Supreme Court (Ph. No.: 040-233224533), as the Sole Arbitrator in the matter. The learned Arbitrator will be paid his fee as per the provisions of the Fourth Schedule appended to the 1996 Act.

12. Needles to say, before entering upon reference, the learned Arbitrator will file a declaration as required under Section 12 (5) read with other attendant provisions of the 1996 Act.

13. The Registry will despatch a copy of this order to the learned Arbitrator.

RAJIV SHAKDHER, J

FEBRUARY 26, 2019

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