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

+ **ARB.P. 320/2020**

**DILIP BUILDCON LIMITED VARAHA INFRA LIMITED**

..... Petitioner

Through: Mr. Manoj K. Singh, Ms. Gunita  
Pahwa and Mr. Apoorve Vashistha, Advs.

Through

versus

**NATIONAL HIGHWAYS AUTHORITY OF INDIA  
THROUGH ITS CHAIRMAN**

..... Respondent

Through: Mr. Bharat Singh and Mr.  
Prateek Rai, Advs. for R-1/NHAI  
Mr. Mahaling Malikarjun Pandarge, Adv.  
for R-2/IRC

**CORAM:**

**HON'BLE MR. JUSTICE C.HARI SHANKAR**

**J U D G M E N T ( O R A L )**

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**04.12.2020**

(Video-Conferencing)

1. This judgment was dictated in part on 2<sup>nd</sup> December, 2020, when further dictation was deferred at the request of Mr. Manoj Singh who desired to rely on certain documents which were not on record. Mr. Manoj Singh has forwarded certain compilations as well as the guidelines of the Indian Roads Congress (IRC) regarding the appointment of arbitrators, by way of e-mail to the Court Master and the Court has permitted Mr. Manoj Singh to advance additional

submissions on the basis thereof, which have been duly taken into consideration.

2. This petition, under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the “1996 Act”) seeks the appointment of a Presiding Arbitrator, to complete the Arbitral Tribunal which would arbitrate on the disputes between the parties, as the arbitrators of the petitioner and the respondent have not been able to arrive at a consensus regarding the Presiding Arbitrator. The arbitration clause, in the Engineering Procurement & Construction (EPC) Agreement dated 1<sup>st</sup> September, 2015, between the parties, reads as under:

**“ARTICLE 26  
DISPUTE RESOLUTION**

**26.1 Dispute Resolution**

26.1.1. Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the “**Dispute**”) shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 26.2.

26.1.2. The Parties agree to use their best efforts for resolving all Disputes arising under or in respect of this Agreement promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any Dispute.

**26.2 Conciliation**

In the event of any Dispute between the Parties, either Party may call upon the Authority’s Engineer, or such other

person as the Parties may mutually agree upon (the “**Conciliator**”) to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Conciliator or without the intervention of the Conciliator or without either Party may require such Dispute to be referred to the Chairman of the Authority and the Chairman of the Board of Directors of the Contractor for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) business days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the 7 (seven) business day period or the Dispute is not amicably settled within 15 (fifteen) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30 (thirty) days of the notice in writing referred to in Clause 26.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 26.3.

### **26.3 Arbitration**

26.3.1. “Any Dispute, which is not resolved amicably as provided in Clause 26.1 and 26.2 shall be finally settled by arbitration as set forth below:

(i) The Dispute shall be finally settled by arbitration in accordance with the Arbitration & Conciliation Act, 1996, or any statutory amendment thereof. The Arbitral tribunal shall consist of 3 Arbitrators, one each to be appointed by NHAI and the Contractor. 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 a consensus within a period of 30 days from the appointment of the Arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the Chairman of the Executive Committee of the Indian Roads Congress.

(ii) Neither party shall be limited in the proceedings before such Tribunal to the evidence or arguments before the other party/ Independent consultant.

(iii) Arbitration may be commenced during or after the Contract Period, provided that the obligations of NHAI and the Contractor shall not be altered by reason of the arbitration being conducted during the Contract Period.

(iv) If one of the parties fails to appoint its Arbitrator in pursuance of Sub-Clause (i) above, within 30 days after receipt of the notice of the appointment of its Arbitrator by the other party, then the Chairman of the Executive Committee of the Indian Roads Congress shall appoint the Arbitrator. A certified copy of the order of the Chairman of the Executive Committee of the Indian Roads Congress, making such an appointment shall be furnished to each of the parties.

(v) Arbitration proceedings shall be held at Delhi, India, and the language of the Arbitration Proceedings and that of all documents and communications between the parties shall be English.”

3. It is not necessary, for the purposes of the present petition, to enter into the specifics of the controversies between the parties, as both parties agree, *ad idem*, that the controversies are arbitrable in nature. Attempts at settlement of the dispute by conciliation having failed, notice for the appointment of the arbitrator was issued by the petitioner to the respondent on 23<sup>rd</sup> December, 2019. *Vide* a subsequent communication dated 5<sup>th</sup> March, 2020, the petitioner suggested the name of Hon’ble Mr. Justice Ashok Bhan, a retired Judge of the Supreme Court of India as its nominee arbitrator. The respondent, *vide* its response dated 6<sup>th</sup> March, 2020, named Mr. Maharaj Krishan Aggarwal as its nominee arbitrator.

4. Article 26.3.1(i) of the EPC Agreement required the two learned arbitrators, nominated by the petitioner and the respondent to appoint the third arbitrator who would act as the Presiding Arbitrator.

The clause further stipulated that, in case the learned arbitrators failed in appointing the Presiding Arbitrator within thirty days from the date of the appointment of the arbitrator appointed subsequently, the Presiding Arbitrator would be appointed by the Chairman of the Executive Committee of the Indian Roads Congress (hereinafter referred to as the “IRC”).

5. As the learned arbitrators, appointed by the petitioner and the respondent could not agree on a third arbitrator to act as the Presiding Arbitrator, this petition has been preferred before this Court, seeking the appointment of a Presiding Arbitrator, to arbitrate on the disputes between the parties.

6. On the very first day, when this matter was listed, Mr. Bharat Singh, learned Counsel for the respondent voiced a preliminary objection to the maintainability of this petition, on the ground that Clause 26.3.1(i) required the parties to approach the Chairman of the IRC, in the event of a failure of the learned arbitrators, appointed by the parties, to appoint a third Presiding Arbitrator. No attempt at approaching the Chairman of the Executive Committee of the IRC having been made, Mr. Bharat Singh submits that the present petition is premature and not maintainable at this stage.

7. Mr. Manoj Singh, learned Counsel for the petitioner submitted, in response, that there was no Chairman of the Executive Committee of the IRC and that, therefore, there could be no question of seeking recourse to the residuary mode of the appointment of the Presiding Arbitrator as contemplated by Article 26.3.1(i).

8. In this view of the matter, the respondent was directed to file an affidavit, explicitly setting out the precise objection as expressed by Mr. Bharat Singh.

9. An affidavit was filed by the respondent, enclosing therewith, the following letter dated 7<sup>th</sup> September, 2020, written by the Deputy Director, IRC:

**“INDIAN ROADS CONGRESS**  
**Kama Koti Marg, Sector - 6,**  
**R.K. Puram, New Delhi -110022 (INDIA)**  
**Tel: 011-26105160, 26185273, 26171548, 26185315**

**No. IRC-17(13)/2020**

**Dated: 07.09.2020**

Shri Harish Sharma  
GM(T) - UP (E),  
National Highways Authority of India,  
G-5 & G-6, Sector - 10,  
Dwarka  
**NEW DELHI – 110 022**

**Sub: Appointment of Presiding Arbitrator by Chairman  
of the Executive Committee of the Indian Roads Congress  
-Reg.**

Sir

Kindly refer to your letter No. NHAI/Ghaghra Bridge -  
Varanasi/Pkg-1/UP(Tech-Div)/2019/2 dated 03.09.2020.

2. In this connection, we wish to confirm that the President, IRC is the Chairman of the Executive Committee of the Indian Roads Congress.

Yours faithfully,  
Sd./-  
**(Rahul Patil)**

Dy. Director (T)”

**10.** As Mr. Manoj Singh questioned the basis of the assertion, in the afore-extracted letter dated 7<sup>th</sup> September, 2020, that the President, IRC was the Chairman of its Executive Committee, the IRC was impleaded as Respondent No. 2 in these proceedings, and was directed to file a separate affidavit, clarifying whether the President of the IRC was also the Chairman of its Executive Committee, with supportive documents.

**11.** An affidavit, has, consequent to the said direction, been filed by the IRC which is represented, in these proceedings, by Mr. Mahaling Malikarjun Pandarge, learned Counsel. The affidavit re-affirms that the President, IRC, is the Chairman of its Executive Committee. In support thereof, the affidavit relies on Clause 19 of the Memorandum of Association, Rules and Regulations of the IRC, which reads thus:

**“19. EXECUTIVE COMMITTEE**

The President, the outgoing President, the Vice Presidents, the Treasurer and the Secretary General shall form the Executive Committee with powers, subject to the approval of the Council to direct and manage the affairs of the Society, to keep the activities of the Society under review, and to report to the Council, from time to time. The Executive Committee shall have power to co-opt not more than two members with power to vote. *Three shall form a quorum, one of them being either the President or a Vice-President. The President or, in his absence, a Vice-President shall preside. If in the absence of the President, more than one Vice-President is present the members attending the meeting shall elect one of the Vice-*

Presidents as a Chairman. The President or Chairman shall have and exercise, in addition to his vote, a casting vote in the case of an equality of votes.”

(Emphasis supplied)

12. While Mr. Pandarge, learned Counsel for the IRC and Mr. Bharat Singh, learned Counsel for the respondent, submit that Clause 19 clearly indicates that the President of the IRC is the Chairman of its Executive Committee. Mr. Manoj Singh, learned Counsel for the petitioner submits that, in fact, the clause indicates to the contrary. Mr. Manoj Singh seeks to point out that the Chairman of the Executive Committee of the IRC is a functionary who is elected only for chairing a particular meeting of the IRC and is not a holder of any specified post in the IRC. In fact, he submits there is no post of the Chairman of the Executive Committee of the IRC. He points out that Clause 19 envisages the election of one of the members of the Executive Committee of the IRC as the Chairman of any particular meeting, only in case the President of the IRC is absent in the said meeting and there are more than one Vice Presidents present. In such an eventuality, he points out, the members of the IRC are required to elect one of the Vice Presidents as the Chairman. As such, he submits there is no post of Chairman of the Executive Committee of the IRC except for any particular meeting, in the exigencies contemplated by Clause 19 of the MOA and that, therefore, there could be no question of referring the issue of the appointment of the Presiding Arbitrator to the Chairman of the Executive Committee of the IRC.

13. I am unable to agree with the submission, the acceptance of which would require this Court to adopt a hyper-technical view of

Clause 19 of the MOA. In my view, Clause 19 of the MOA of the IRC has to be understood in accordance with the plain dictates of common sense. It is clear from a reading of Clause 19 that (i) the Chairman of the IRC is the person who has to chair any particular meeting of the IRC, (ii) in case the President is present during that meeting, he would chair the meeting and would, therefore, be the Chairman of the Executive Committee of the IRC for the said purpose, (iii) in case the President is not present, and there is one Vice President present, that Vice President would be the Chairman of the Executive Committee and (iv) if, however, in the meeting, the President is absent and there are more than one Vice Presidents present, the Chairman of the Executive Committee would be elected by the members, obviously so as to avoid an impasse and to ensure that the meeting is chaired. This cannot lead to an inference that, save and except where such an exigency arises, there *is* no Chairman of the Executive Committee of the IRC. To reiterate, it is clear, to me, that, *if the President of the IRC is present, he would be the Chairman of the Executive Committee of the IRC for all meetings in which he would be present.* Clause 19, in my opinion cannot be accorded any other understanding. The submission of Mr. Manoj Singh that the President of the IRC is not the Chairman of its Executive Committee, for the purposes of Clause 26.3.1(i) of the EPC Agreement, is therefore, rejected.

**14.** Mr. Manoj Singh, thereafter advances a second submission, to the effect that the Chairman of the Executive Committee of the IRC would be disabled from appointing the Presiding Arbitrator in view of

Section 12(5) of the 1996 Act read with the judgment of the Supreme Court in *Perkins Eastman Architects DPC v. HSCC (India) Limited*<sup>1</sup> and *Bharat Broadband Network Ltd. v. United Telecoms Ltd.*<sup>2</sup>.

15. Section 12(5) of the 1996 Act reads thus:

**“12. Grounds for challenge.**

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(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.”

16. The Seventh Schedule to the 1996 Act reads thus:

**“THE SEVENTH SCHEDULE**

**Arbitrator's relationship with the parties or counsel**

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.
3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.

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<sup>1</sup> AIR 2020 SC 59  
<sup>2</sup> (2019) 5 SCC 755

4. The arbitrator is a lawyer in the same law firm which is representing 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.
6. The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.
7. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.
8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator nor his or her firm derives a significant financial income therefrom.
9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.
10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.
11. The arbitrator is a legal representative of an entity that is a party in the arbitration.
12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.
13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.

14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.

### **Relationship of the arbitrator to the dispute**

15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.

16. The arbitrator has previous involvement in the case.

### **Arbitrator's direct or indirect interest in the dispute**

17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.

18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.

19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.

Explanation 1.- The term "close family member" refers to a spouse, sibling, child, parent or life partner.

Explanation 2.- The term "affiliate" encompasses all companies in one group of companies including the parent company.

Explanation 3.- For the removal of doubts, it is clarified that it may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialised pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, this is a relevant fact to be taken into account while applying the rules set out above."

17. Mr Manoj Singh points out that while Section 12(5) talks about disqualification of the arbitrator, the Supreme Court, in *Perkins Eastman*<sup>1</sup> extended the disability under Section 12(5) to persons who would be appointing the arbitrators as well. In other words, the Supreme Court held that, if the arbitrator was disabled from acting as an arbitrator on account of his falling within one of the exempted categories in Section 12(5) read with the Seventh Schedule to the 1996 Act, equally, such a person could not appoint another person as an arbitrator either.

18. There can be no cavil with this proposition.

19. The submission of Mr. Manoj Singh is that two of the main members of the Executive Committee of the IRC are employees of the Ministry of Road, Transport and Highways (MoRTH), which entirely controls the NHAI. As such, he submits, the authority to appoint the Presiding Arbitrator cannot be conferred on the Executive Committee of the IRC, owing to Section 12(5) read with the Seventh Schedule to the 1996 Act.

20. I am unable to agree with this submission either. Clause 26.3.1(i) of the EPC does not contemplate the appointment of the Presiding Arbitrator *by the Executive Committee of the IRC*, in the event of the two arbitrators being unable to arrive at a consensus regarding the third arbitrator. It requires that the third arbitrator be appointed *by the Chairman of the Executive Committee of the IRC*. I have already held that the President of the IRC is the Chairman of its

Executive Committee. In exercising authority under Clause 26.3.1(i) of the EPC, the President of the IRC, as the Chairman of its Executive Committee, does not act on behalf of, or as a representative of, the Executive Committee. He acts in his individual capacity, albeit *ex officio*. The President of the IRC admittedly does not fall within any of the excepted categories under Section 12(5) read with the Seventh Schedule to the 1996 Act. As such, it cannot be said that the Chairman of the Executive Committee of the IRC i.e. the President of the IRC, is disabled from appointing the Presiding Arbitrator, by virtue of Section 12(5) read with the Seventh Schedule to the 1996 Act.

**21.** Mr. Manoj Singh further places reliance on the recent judgment of this Court in *Larsen & Toubro Limited v. NHAI*<sup>3</sup>. The relevant provision for arbitration, in the agreement between the parties in that case, read thus:

### **“26.3 Arbitration**

26.3.1 Any dispute, which is not resolved amicably as provided in clause 26.1 and 26.2 shall be finally settled by arbitration as set forth below:

- i) The Dispute shall be finally settled by arbitration in accordance with the Arbitration and Conciliation Act, 1996, or any statutory amendments thereof. The Arbitral Tribunal shall consist of 3 Arbitrators, one each to be appointed by NHAI and the concessionaire. The third arbitrator shall be chosen by the two Arbitrators so appointed by the Parties and shall act as Residing Arbitrator. In case of failure of

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<sup>3</sup> MANU/DE/1982/2020

the two Arbitrators, appointed by the parties to reach upon a consensus within period of 30 days from the appointment of the Arbitrator appointed subsequently, the Residing arbitrator shall be appointed by the Chairman of the Executive Committee of the Indian Roads Congress.”

**22.** In that case, the petitioner, L & T Limited (hereinafter referred to as “L&T”) approached the Secretary General of the IRC, for the appointment of the Presiding Arbitrator, as the two arbitrators, appointed by the parties, could not arrive at a consensus in that regard. As the IRC did not appoint any arbitrator, L & T moved this Court, under Section 11(6) of the 1996 Act. While the representation of L & T was pending before the IRC, the NHAI, *vide* letter dated 30<sup>th</sup> April, 2020, appointed one Mr. Prabhat Krishna as its nominee arbitrator. The IRC wrote, on 8<sup>th</sup> May, 2020, to L & T, informing L & T that NHAI had itself appointed its nominee arbitrator and effectively treated the matter as closed at that point. It was in these circumstances that this Court held that, once the IRC had been approached by L & T, the IRC was required to follow the procedure contained in its guidelines for the appointment of the arbitrator, and could not abdicate its function and merely close the case on the appointment of the arbitrator by NHAI. This Court took the view that the right of NHAI to appoint the arbitrator stood closed, once the ball had been thrown into the court of the IRC, and that the IRC could not throw it back into the court of the NHAI.

**23.** No such situation arises in the present case. The petitioner has not even approached the IRC.

24. Besides, in para 25 of its judgment in *L & T Ltd*<sup>3</sup>, this Court has clearly observed that no issue, regarding the competence of the Secretary General of the IRC to entertain the request of L & T, when the agreement between the parties specifically required L & T to approach the Chairman of the Executive Committee of the IRC, was urged. As such, this Court observed that the said issue did not arise for consideration and that it was proceeding on the premise that the Secretary General of the IRC was competent to entertain the representation of L & T. *Per contra*, in the present case, the existence of the Chairman of the Executive Committee of the IRC is an issue at which the parties are seriously in conflict. It is clear, in view of the disclaimer contained in para 25 of the judgment in *L & T Ltd*<sup>3</sup>, that the said decision cannot assist the adjudication of the controversy before me, to any appreciable extent.

25. Mr. Manoj Singh also made a passing reference to the judgment of the Supreme Court in *Walter Bau AG v. Municipal Corporation of Greater Mumbai*<sup>4</sup>, on which this Court had placed reliance in *L&T Ltd*<sup>3</sup>. The fundamental reason why the reliance, by Mr. Manoj Singh, on the decisions in *L&T Ltd*<sup>3</sup> and *Walter Bau*<sup>4</sup> can be of no assistance to him, is that, in the said decisions, the concerned parties had approached the IRC (in the case of *L&T Ltd*<sup>3</sup>) and the International Centre for Alternative Dispute Resolution (ICADR) (in the case of *Walter Bau AG*<sup>4</sup>) and the issue before the Court was whether the agency so approached had followed due procedure, as

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<sup>4</sup> (2015) 3 SCC 800

contained in its guidelines, for appointing the arbitrator(s). In both cases, the finding of the Court was that the said procedure had not been followed and that, therefore, the mantle for appointing the Presiding Arbitrator was required to be donned by this Court.

**26.** These decisions cannot assist the resolution of the present dispute, where the petitioner has, to reiterate, not even approached the Chairman of the Executive Committee of the IRC in the first instance.

**27.** Mr. Manoj Singh also sought to take me through various clauses of the guidelines for appointment of arbitrators, as framed by the IRC. On the Court questioning Mr. Manoj Singh regarding the relevance of these guidelines, in the face of the fact that the petitioner had never approached the IRC, Mr. Manoj Singh's submission is that, were the guidelines to be followed, the appointment of the arbitrator would have to be made by the Secretary General of the IRC. The Chairman of the Executive Committee of the IRC, according to him, has no authority to appoint any arbitrator, under the said guidelines. This, of course, is without prejudice to his first submission that the Chairman of the Executive Committee of the IRC is, as he initially submitted, a "fictitious entity".

**28.** Before dealing with this argument, I may also reproduce, for ready reference, Clauses 10, 16, 19 and 22 of the Memorandum of Association (MOA) of the IRC, as Mr. Manoj Singh placed reliance on these clauses as well. Citing these clauses, Mr. Manoj Singh reiterated his submission that the Chairman of the IRC was a

“fictitious entity” and that, in any case, separate references to the President and the Chairman of the IRC are to be found in these clauses, which itself goes to show that the President of the IRC is not the Chairman of its Executive Committee. The relevant provisions of the MOA of the IRC, read thus:

“10. The Council shall at its first meeting after each Annual General Meeting elect a President and not more than four Vice - President of the Society from among its own members, who shall hold office and continue to be members of the Council till new Council has been elected. The President shall have power to fill any vacancies in the office of the Vice - Presidents that may occur between two General Meetings.

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16. If at any time the President for the time being is absent from India, or is unable to perform the duties of his office, he shall nominate a Vice - President to act for him. In the event of the President failing to nominate one of the Vice - President as aforesaid, the Vice - President shall effect one of themselves to perform the office of the President.

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#### 19. EXECUTIVE COMMITTEE

The President, the outgoing President, the Vice-Presidents, the Treasurer and the Secretary General shall form the Executive Committee with powers, subject to the approval of the Council to direct and manage the affairs of the Society, to keep the activities of the Society under review, and to report to the Council, from time to time. The Executive Committee shall have power to co-opt not more than two members with **powers with power to vote**. Three shall form a quorum, one of them being either the President or a Vice - President. The President or in his absence, a Vice - President shall preside. If in the absence of the President, more than one Vice - President is present the members attending the meeting shall elect one of the Vice - Presidents as a Chairman. The

President or Chairman shall have and exercise, in addition to his vote, a casting vote in the case of an equality of votes.

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22. The President shall provide at all General Meetings of the Society or shall nominate a Vice-President or in their absence nominate some other member of Council to preside in his place. In the absence of the President and of the Chairman nominated by his President at any meeting, the members present shall elect a Chairman. The Chairman shall have a casting vote.”

29. These last two submissions of Mr. Manoj Singh, in my view, are mutually destructive of each other. It is not open to the petitioner to simultaneously contend that the Chairman of the Executive Committee of the IRC and the President of the IRC are two different persons, and that the Chairman of the Executive Committee of the IRC is a fictitious entity. At this stage, Mr. Manoj Singh interrupts to state that, when he said that the Chairman of the Executive Committee of the IRC was “fictitious”, what he intended to convey was that the Chairman of the Executive Committee is an entity created to cater to the exigencies of a particular meeting of the Executive Committee – a submission that has already been noted hereinabove – and had no other distinct legal existence.

30. A bare reading of the clauses of the MOA of the IRC, on which Mr. Singh relies, reveals that the Chairman of the IRC is not fictitious in any sense of the word. At the same time, I agree with Mr. Manoj Singh that the Chairman of the Executive Committee of the IRC is the person who would chair a particular meeting of the Executive Committee. That much is apparent even from a plain reading of

Clause 19 of the MOA of the IRC. That issue is, however, in my view tangential to the question of whether the President of IRC can be treated as the Chairman of its Executive Committee. To reiterate what I have already held hereinabove, Clause 19 of the MOA of the IRC, properly read, clearly envisages the President of the IRC as the Chairman of its Executive Committee. In the absence of the President, the Vice-President of IRC would chair the Executive Committee. If the President of the IRC is not present at the meeting, and if there are more than one Vice-Presidents present, the members of IRC are given the authority to elect the Chairman of the Executive Committee. *Where no such special exigency arises, therefore, the President of the IRC is the Chairman of its Executive Committee.*

**31.** Mr. Manoj Singh then proceeded to contend, as a fallback submission, that the Chairman of the Executive Committee of the IRC was disabled from appointing the Presiding Arbitrator, in view of Section 12(5) of the 1996 Act read with the Seventh Schedule thereto, which already stand reproduced hereinabove. Mr. Singh sought to pigeonhole the disability, from which the Chairman of the Executive Committee of IRC would suffer, under Serial Nos. 1, 2, 8, 14 and 15 of the Seventh Schedule.

**32.** I am unable to agree with this submission either. Clause 1 of the Seventh Schedule covers employees, consultants, advisors, or persons having past or present business relationships with either party to the case. It cannot be said that the President of the IRC, as the Chairman of its Executive Committee, was the employee, consultant,

advisor or person having any past or present business relationship with the NHAI. In any event, there is nothing on record to even suggest the existence of any such relationship. Clause 2 covers persons who represent or advise one of the parties, or is an affiliate of one of the parties. As in the case of Clause 1, there is nothing to indicate that the President of the IRC advised the NHAI. No reference to any such advice is to be found in the petition. Needless to say, the President of the IRC cannot be treated as representing the NHAI or an affiliate of the NHAI. Clause 2, also, therefore, does not apply. Clause 8 applies where the arbitrator regularly advises the appointing party, or is an affiliate of the appointing party. It is nobody's case that the President of the IRC regularly advises NHAI, or is an affiliate of NHAI. Clause 14 is more or less identical to Clause 8, the sole difference being that in the case of Clause 14, the arbitrator, or the person appointing the arbitrator, derives significant financial income from one of the parties. As such, clause 14 also would not apply. Clause 15 covers cases where the arbitrator has given legal advice or provided expert opinion on the dispute to one of the parties or an affiliate of one of the parties. It goes without saying that this clause has absolutely no application, as neither the President of the IRC nor, for that matter, any person in the organisation of the IRC is alleged to have given any legal advice to the NHAI, or provided any expert opinion on the present dispute. The reliance, by Mr Singh, on the Seventh Schedule to the 1996 Act is, consequently, of no avail.

**33.** Mr. Singh, lastly invited my attention to the following recital contained in the website of the IRC:

### **“ Administrative Setup**

- The affairs of the IRC are guided by a Council of the society. For managing the affairs of IRC, the powers are vested with Executive Committee (EC) which comprises of the President, IRC, Immediate Past President, four Vice-Presidents, Honorary Treasurer and Secretary General. IRC Secretariat is headed by Secretary General.
- The tenure of the Council is for one year and is represented by the members from each State/ Union Territories by nominations besides member representatives nominated by important road owning Government departments, Ten elected members representing research institutions, municipalities, local bodies, Private Sector, etc. and Two ladies Members.
- IRC works in close collaboration with Ministry of Road Transport and Highways (MoRTH). The Director General (Road Development) & Special Secretary, MoRTH, is the Honorary Treasurer of the IRC.”

I am unable to understand how this clause would assist the petitioner, as the dispute in the present case is not with the MoRTH but with the NHAI. The attempt of Mr. Singh, in equating the MoRTH and the NHAI, on the premise that the NHAI worked under the aegis of the MoRTH, in my view, has no legal legs to stand on. In any case, no case for holding the President of the IRC as ineligible to appoint the Presiding Arbitrator, premised on Section 12(5) read with the Seventh Schedule to the 1996 Act, can be said to exist.

**34.** In view of the above discussion, I am in agreement with Mr. Bharat Singh, learned Counsel for the NHAI, that the present petition is premature. On the arbitrators appointed by the petitioner and NHAI having failed to arrive at a consensus regarding the Presiding Arbitrator, the petitioner ought to have approached the Chairman of the Executive Committee of the IRC who, as I have already opined

hereinabove, is the President of the IRC. What would have transpired thereafter, is anybody's guess; suffice it to state that if the attempt at approaching the President of the IRC, being the alternative mode of appointment of the Presiding Arbitrator envisaged in Clause 26.3.1(i) of the agreement between the parties, does not fructify, the petitioner would always be at liberty to re-approach this Court for the appointment of the Presiding Arbitrator. It also goes without saying that, if the President of the IRC does not proceed in accordance with law, consequent on the petitioner approaching him for the appointment of the Presiding Arbitrator, the right of the petitioner to challenge any action or decision taken by the President of the IRC would also remain reserved.

**35.** Subject to liberty as aforesaid, this petition is dismissed as premature, with no orders as to costs.

**C.HARI SHANKAR, J**

**DECEMBER 4, 2020**

Kr..