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

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Date of decision: 20.09.2021

+ **ARB.P. 922/2021**

AMAZING INDIA CONTRACTORS PRIVATE LIMITED

..... Petitioner

Through: Mr. Rajat Bhalla, Advocate

Versus

**INDIAN RAILWAY STATIONS DEVELOPMENT
CORPORATION LIMITED**

..... Respondent

Through: Mr. Rakesh Bhalla, Advocate

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

J U D G M E N T (oral)

The hearing has been conducted through video conferencing.

I.A. 12233/2021 (exemption)

1. Allowed subject to all just exceptions.
2. Application is disposed of.

ARB.P. 922/2021 & I.A.12232/2021

3. The present petition has been filed by petitioner seeking appointment of a Sole Arbitrator under the provisions of Section 11(6) of the Arbitration and Conciliation Act, 1996.
4. Petitioner, a private limited company registered under the Companies

Act, 1956, claims to be involved in the business of Facilities Management and Infrastructure Management Projects throughout India. Respondent is said to be a Special Purpose vehicle and a Joint Venture company of IRCON International Limited, a Government of India Undertaking, under the Ministry of Railways and Rail Land Development Authority incorporated under the Companies Act, 1956.

5. According to petitioner, on 24.09.2019 the respondent issued Notice Inviting Tender No. IRSDC/HQ/ TENDER/2019/25/ SBC/ Parking issued by the Indian Railway Station Development Corporation for the project "Management of Parking Area at Bangalore Railway Station Along with Access Control for a period of 3 (Three) years" and petitioner submitted a bid thereto on 24.09.2020. Pursuant thereto, respondent invited petitioner to attend negotiation meeting on 13.11.2019 and after successful negotiations, respondent issued a Letter of Award bearing IRSDCIHQ/ TENDER/2019/25/SBC/Parking/1861 dated 14.11.19 in favour of petitioner for the said project, to which petitioner gave its Letter of Acceptance on 06.12.2019.

6. It is further averred on behalf of petitioner that in terms of aforesaid Letter of Award, petitioner is required to pay annual license fee of

Rs.2,62.50,000/- which was duly deposited and also respondent was duly sent "Letter of Acceptance dated 16.11.2019" by the petitioner. Petitioner vide its letter dated 06.12.2019 also communicated the respondent about payment of first quarter of license fee and security deposit and acceptance of the project for period of three years. Further pleaded by petitioner that it sent an e-mail to the respondent informing that petitioner was ready to execute its part of obligation from 15.12.2019. However, despite visit by Director of petitioner from Hyderabad to New Delhi office of respondent on 05.12.2019 and 19.12.2019 for signing the Agreement, however, the agreement could not be signed on the pleas of respondent that the format of Agreement was not ready.

7. Thereafter, according to petitioner, a communication dated 24.01.2020, was received from respondent stating that temporary electricity connection was granted for the work and payment of Rs.500/- per day was required to be made in favour of Sr. Technical Manager/ Knight Frank, which the petitioner did and commenced the work. But even thereafter, the Agreement for the work could not be signed and Director of the Petitioner had to return empty hand back to Hyderabad, as authorized representative of respondent was said to be unavailable. The respondent vide its

communication dated 18.03.2020 asked for present of Director of petitioner for the purpose of signing the Contract Agreement, however, due to Covid 19 pandemic and declaration of Janta Curfew by the Hon'ble Prime Minister from 22.03.2020, none on behalf of petitioner could reach the respondent to sign the Contract Agreement. In furtherance thereto, even respondent itself vide letter dated IRSDC/BLR/C/SBC/2020/0 192 dated 23.03.2020 issued an advisory with aspect to the closure of all commercial establishments at the KSR Bengaluru Railway Station till 31.03.2020 and the said advisory was further extended vide further letters dated 31.03.2020,14.04.2020, 02.05.2020 and 17.05.2020. It is averred on behalf of petitioner that due to Covid pandemic and phrased lockdown, it became difficult for petitioner's representative/Director to reach Delhi to sign the Agreement.

8. Further, vide notification dated 20.05.2020 bearing reference No. COVID-19 Corres, issued by the Railway Board & South Western Railways, respondent advised opening of all static catering and vending units. However, vide its communication dated 21.05.2020 bearing reference No. IRSDC/BLR/SBC/2020/0108 stating that furtherance to the letters from Railway Board & South Western Railways bearing reference nos.2020/Catering/600/0I/Pt.2 an C. 79/Catg/COVID-19 Corres dated

20.05.2020, the order dated 02.05.2020 bearing reference No. IRSDC/BLR/C/SBC/2020/0 100 stands cancelled on the plea that they would be unable to start the operation with the current license fee since the Central Government has discouraged people from taking public transport. Hence, on 25.05.2020, Director of petitioner sent an email to the DGM of respondent seeking exemption from payment of license fee due to Covid pandemic till the situation normalized and requested the respondent to provide some percentage from the earnings and not to include the 03 years tenure.

9. Thereafter, on 02.06.2020, petitioner re-commenced the operations at the Parking site at KSR Bengaluru Railway Station with *pro-rata* license fee of 10% of prevailing license fee. On even date, respondent communicated the petitioner that only 18 staffers are allowed to operate at the parking lot and also invited Director of the petitioner to sign the contract agreement on 15.06.2021. However, vide communications dated 17.06.2021, petitioner's Director informed the respondent that due to ill health and under treatment due to Covid pandemic, he is unable to travel. However, vide communication dated 13.06.2020 petitioner had already communicated the respondent that due to heavy monetary loss because of Covid pandemic,

petitioner was unable to provide services at 10% pro rata license fee as also to meet the salary of the staff and other expenses and so, requested to take over the parking lot and permit the petitioner to stop its services without including the stop period in the 3- year contract tenure. This was followed by various communications dated 09.07.2020; 11.08.2020; 08.09.2020; 18.09.2020; 15.10.2020 and 27.10.2020 between the parties.

10. However, thereafter, respondent issued a Show Cause Notice dated 18.11.2020, bearing No. IRSDC/HQ/ TENDER/2019/25/SBC/Parking/1444 stating that in terms of clause 1.12.3 of “Instruction to Bidders” with the Letter of Award dated 14.11.2019 petitioner was required to enter into the Contract within thirty(30) days and has thereby, violated the terms of clause 1.12.4. and also alleged that the Directors of the petitioner had been disqualified by the Registrar of Companies Patna from 01.12.2017 to 30.11.2022 under Section 164(2) of the Companies Act, 2013 resulting in their offices becoming vacant under Section 167 of the Companies Act and since the bid was submitted by Mr. Kalyan Kumar Singh, Director, his position as Director in AICPL stood void *ab-initio* and that the bid was won under fraudulent practices as defined under Clause 2(c) of Instructions to Bidders'. Again on 9.12.2020, the respondent issued a Termination Notice

Bearing IRSDC/HQ/TENDER/ 2019/21 /SBC/Parking/1528 ("*Termination Notice*") to petitioner under Clause 5.2 of the General Condition of Contract Schedule II of the Contract and Terminated the contract in question.

11. According to petitioner, acting in an arbitrary and fraudulent manner, the total security deposit and bank guarantee of Rs.86,88,750.00 along with unexpired period of license fee was forfeited by the respondent. Further, claimed that petitioner vide its letter dated 19.12.2020, sent its reply to aforesaid Show Cause Notice as well as Termination Notice to the respondent. However, respondent has forfeited the security deposit amount as well as amount of unexpired period of license fee and also has illegally and unlawfully invoked the bank guarantees despite pendency of OMP (I) 440 of 2020 filed on behalf of petitioner.

12. To resolve the aforesaid disputes, petitioner vide its legal notice dated 8.4.2021 called upon the respondent to appoint an Arbitrator, who vide communication dated 26.04.2021 informed the petitioner that due to Covid pandemic that the matter shall be looked into in due course of time. However, vide email dated 15.7.2021, the Managing Director of the respondent informed the petitioner about appointment of Arbitrator.

13. During the course of hearing learned counsel for petitioner submitted

that unilateral appointment of Arbitrator by the respondent is contrary to the law laid down by the Hon'ble Supreme Court in *Perkins Eastman Architects DPC & Anr. Vs. HSCC (India) Ltd.* 2019 SCC Online SC 1517. Reliance is also placed upon decisions of Hon'ble Supreme Court in *Bhara tBroadband network Ltd. Vs. United Telecom Limited* 2019 5 SCC 755 and *TRF Ltd. Vs. Energo Engineering Projects Ltd.* (2017) 8 SCC 377 in support of above submissions.

14. Thus, a prayer is made to allow the present petition and appoint an Arbitrator to resolve the disputes between the parties.

15. On the other hand, Mr. Rakesh Bhalla, Advocate, appearing on behalf of respondent has disputed the contentions raised in the present petition and submits that in terms of Clause 10.4(d) of the Agreement, it was mutually agreed that the disputes shall be referred to the sole Arbitrator, who shall be appointed from the panel of Arbitrators/Arbitration Tribunal appointed by Managing Director & CEO of IRSDC and thereby, the present petition seeking appointment of an Arbitrator is not maintainable.

16. This Court has heard learned counsel for the parties and has gone through the petition as well as decisions relied upon. Pertinently, invocation of arbitrator vide legal notice dated 8.4.2021 by the petitioner as well as

appointment of Arbitrator under the General Condition of Contract Schedule II is not disputed by counsel for the parties. The submission of learned counsel appearing on behalf of respondent that the respondent has a right to appoint the Arbitrator does not stand, as the Hon'ble Supreme Court in ***Perkins Eastman Architects DPC & Anr. Vs. HSCC (India) Ltd.*** 2019 SCC Online SC 1517 has categorically stated that “*in cases where one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator.*”

17. The afore-noted dictum of Hon'ble Supreme Court in ***Perkins Eastman (Supra)***, has been followed by Coordinate Benches of this Court in ***Proddatur Cable Tv Digi Services Vs. Siti Cable Network Limited*** 2020 SCC OnLine Del 350 and ***VSK Technologies Private Limited and Others Vs. Delhi Jal Board*** 2021 SCC OnLine Del 3525 in unequivocal terms.

18. Concurring with the decisions as noted above, the present petition is allowed.

19. Accordingly, **Mr. Justice (Retd) I.S.Mehta, former Judge of Delhi High Court (Mobile: 9910384616)** is appointed sole Arbitrator to

adjudicate the dispute between the parties. The arbitration shall be conducted under the Delhi International Arbitration Centre (DIAC).

20. The fee of the Arbitrator shall be in accordance with the Schedule of Fees prescribed under the Delhi International Arbitration Centre (DIAC) (Administrative Cost and Arbitrators Fees) Rules, 2018.

21. The learned Arbitrator shall ensure compliance of Section 12 of Arbitration and Conciliation Act, 1996 before commencing the arbitration.

22. A copy of this order be sent to the learned Arbitrator as well as Delhi International Arbitration Centre (DIAC) for information.

23. With aforesaid directions, the present petition is accordingly disposed of. I.A.12232/2021 is disposed of as infructuous.

(SURESH KUMAR KAIT)
JUDGE

SEPTEMBER 20, 2021

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