

**IN THE HIGH COURT AT CALCUTTA
ORIGINAL CIVIL JURISDICTION**

(Original Side)

A.P. No. 413 of 2020
(Through Video Conferencing)

Reserved on: 04.01.2022

Pronounced on: 28.01.2022

CIVON CONSTRUCTION PVT. LTD.

....Applicant(s)

Through : Mr. S. Sen,
Mr. T. Singha Roy, Advocates

v/s

IRCON INTERNATIONAL LIMITED

....Respondent(s)

Through : Mr. J. Banerjee,
Mr. B.K. Saha,
Mr. J. Datta,
Mr. A. Mondal, Advocates

**Coram : HON'BLE MR. JUSTICE PRAKASH SHRIVASTAVA,
CHIEF JUSTICE**

Prakash Shrivastava, C.J.:

1. This application under Section 11(6) of the Arbitration and Conciliation Act, 1996 has been made by the applicant for appointment of sole arbitrator to resolve the dispute.

2. Undisputedly, the Letter of Acceptance dated 03rd May, 2016 was issued by the respondent in favour of the applicant accepting the tender and awarding the contract for the work specified in Clause 2 of the LOA. The dispute had arisen between the parties, therefore, in terms of general conditions of contract, applicant had exhausted the remedy of settlement and conciliation. The relevant clause relating to arbitration is as under:

“73.2 Conciliation/Arbitration

73.2.1 It is a term of this contract that Conciliation/Arbitration of disputes shall not be commenced unless an attempt has first been made by the parties to settle such disputes, within 120 days of submission of monthly statement of such claim, through mutual settlement.

73.2.2 In the event of failure to resolve any dispute or difference between the parties hereto as to the construction or operation of this contract, or the respective rights and liabilities of the parties on any matter in question, dispute or difference on any account or as to the withholding by the Employer of any certificate to which the contractor may claim to be entitled to, through mutual settlement, the Contractor may refer such matters to the Chairman and Managing Director in writing within 60 days from the date of failure of amicable settlement of such disputes or differences for settlement through Conciliation.

If the efforts to resolve all or any of the disputes through Conciliation fails, the Contractor may refer to the Chairman and Managing Director of the Employer for settlement of such disputes or differences through Arbitration. No disputes or differences shall be referred to Arbitration after expiry of 60 days from the date of notification of the failure of Conciliation.

73.2.3 The demand for Conciliation or Arbitration shall specify the matters which are in question, or subject of the dispute or difference as also the amount of claim item wise. Only such dispute (s) or difference (s) in respect of which the demand has been made, together with counter claims or set off, given by the Employer, shall be referred to Conciliation or Arbitration and other matters shall not be included in the reference.

73.2.3(1) The Arbitration proceeding shall be assumed to have commenced from the day, a written and valid demand for arbitration is received by the Employer.

93.4(a)(i) Sole Conciliator/Sole Arbitrator:

In cases where the total value of all claims/counter-claims in question added together does not exceed Rs. 2.00 Crore (Rupees Two Crores), the Arbitral Tribunal shall consist of a sole arbitrator who shall be an officer of IRCON not below GM level, nominated by the Chairman and Managing Director.

The sole arbitrator shall be appointed by the Chairman and Managing Director of the Employer within 60 days from the day when a written and valid demand for arbitration is received by the Employer.

73.4(a)(ii) Arbitration Tribunal:

In cases where the total value of all claims/counter-claims exceeds Rs. 2.00 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 3 names to the contractor, within 60 days from the day when a written and valid demand for arbitration is received by the Employer. Contractor will be asked to suggest to the Chairman and Managing Director at least 2 names out of the panel for appointment as the contractor's nominee within 30 days from the date of dispatch of the request by the Employer. The Chairman and Managing Director shall appoint at least one out of them as the contractor's nominee and will, also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel, duly indicating the 'presiding arbitrator' from amongst the 3 arbitrators so appointed. The Chairman and Managing Director shall complete this exercise of appointing the Arbitral Tribunal within 30 days from the receipt of the names of contractor's nominees. While nominating the arbitrators it will be necessary to ensure that one of them is from the Accounts Department. An officer of AGM rank of the Accounts Department shall be considered of equal status to the GM of the other departments of IRCON for the purpose of appointment of arbitrator.

3. In the present case, the value of claim is stated to be more than Rs. 2 Crores, therefore, Clause 73.4.a(ii) is relevant. The above clause empowers the employer to sent panel of more than 3 names to the Contractor and gives option to the Contractor to suggest to the Chairman and Managing Director at least 2 names out of the panel and gives power to the Chairman and Managing Director to appoint at least one out of them as Contractor's Nominee and to appoint the balance number of arbitrators either from the panel or from outside the pane. It further provides that one of the arbitrator will be from the Accounts Department. The arbitral panel is to consist of a panel of 3 Officers of the respondent, therefore, in terms of Section 12(5) of the Act, the said panel is not eligible to arbitrate the matter. There is nothing on record to show that the parties had waived of the applicability of Section 12(5) of the Act by any agreement in writing.

4. Learned Counsel for the respondent has placed reliance upon the judgment of the Hon'ble Supreme Court dated 17th December, 2019 in **CA No. 9486-9487 of 2019** in the matter of **Central Organisation for Railway Electrification vs. ECI-SPIC-SMO-MCML (JV) A Joint Venture Company** but in that case, the modified Clause 64(3)(a)(ii) and 64(3)(b) of the GCC was under consideration where the Arbitral Tribunal was to consist of a panel of three retired railway employees but that is not so in the present case.

5. In view of the judgment of the Hon'ble Supreme Court in the matter of **TRF Limited Vs. Energo Engineering Projects Limited, (2017) 8 SCC 377** and in the matter of **Perkins Eastman Architects DPC Vs. HSCC (India) Limited, 2019 SCC OnLine SC 1517**, under Clause 73.4(a)(ii), the Chairman and Managing Director is no longer competent to appoint the panel of 3 Officers of the respondent out of which, one was to be from the Accounts Department. Clause 73.4(a)(ii) does not state that this panel will be of retired employee, on the contrary, it indicates that the Arbitral Tribunal will consist of 3 Officers not below

GM level meaning thereby working officers are to be the members of the Arbitral Tribunal. Hence, Chairman and Managing Director had become ineligible to appoint the arbitral panel in terms of Clause 73.4(a)(ii).

6. The next objection raised by the respondent is that no notice in terms of Section 21 of the Act was served invoking Arbitration Clause. As per the submission of learned Counsel for the applicant, the notice dated 18th December, 2020 was sufficient but a perusal of the said notice indicates that there was no prayer therein for appointment of the sole arbitrator or panel of arbitrators nor any name of proposed arbitrator was suggested therein. That apart, the stand of the respondent is that the notice dated 18th December, 2020 was served upon the applicant after filing of the present application under Section 11 of the Act which was filed on 23rd December, 2020. Since the applicant has failed to give notice invoking the Arbitration Clause, hence, the application under Section 11 is premature. Accordingly, A.P. is dismissed, however, with liberty to the applicant to approach this Court again after giving due notice invoking the Arbitration Clause.

(PRAKASH SHRIVASTAVA)
CHIEF JUSTICE

KOLKATA
28.01.2022
PA(RB)