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

Date of decision: 24th May, 2024

\+ **O.M.P. (T) (COMM.) 2/2024 & I.A. 605/2024**

FOOD CORPORATION OF INDIA ..... Petitioner

Through: Mr. Ajit Pudussery, Adv. (M-9810164651)

versus

MBR SILOS PRIVATE LIMITED & ANR. ..... Respondents

Through: Mr. Sandeep Sethi, Senior Advocate with Mr. Vaibhav Agnihotri, Mr. Sumer Dev Seth, Mr. Harshit Kiran & Ms. Riya Kumar, Advocates. for R-1. (M: 01146572411)
Mr. Gaganmeet Singh Sachdeva & Mr. Akshay Prata Singh, Advs. for R-2. (M: 9582055425)

16 AND

\+ **O.M.P. (T) (COMM.) 3/2024 & I.A. 607/2024**

FOOD CORPORATION OF INDIA ..... Petitioner

Through: Mr. Ajit Pudussery, Adv.

versus

MRB PATIALA STORAGE PRIVATE LIMITED & ANR. ..... Respondents

Through: Mr. Sandeep Sethi, Senior Advocate with Mr. Vaibhav Agnihotri, Mr. Sumer Dev Seth, Mr. Harshit Kiran & Ms. Riya Kumar, Advocates. for R-1.
Mr. Gaganmeet Singh Sachdeva & Mr. Akshay Prata Singh, Advs. for R-2.

CORAM:
JUSTICE PRATHIBA M. SINGH

<u>Prathiba M. Singh, J.</u> (Oral)

1. This hearing has been done through hybrid mode.

<u>Brief background</u>

2. The present petitions have been filed have been filed under Section 14(2) read with Section 15 of the Arbitration and Conciliation Act, 1996 (hereinafter, '*the Act*'). The issue raised in the present petitions is whether the third Arbitrator could have been appointed by the Respondent No.2-International Centre for Alternate Disputes Resolution (hereinafter, '*ICADR*') without the consent and knowledge of the Petitioner-Food Corporation of India (FCI). The other Respondents in the petitions are *i.e.*, - MBR Silos Private Limited and MRB Patiala Storage Private Limited (collectively referred to as '*Respondents'*).

3. Dispute in the present petitions arises out of Concession Agreements signed between parties for implementing Petitioner's silo project in a time-bound manner in Sangrur, Punjab. It is averred that the silo project was intended to minimize post-harvest losses and to maintain grain quality. FCI invited tenders for this purpose, and the Respondents successfully bid to construct a 100,000 MT capacity silo in Sangrur, Punjab. The Concession Agreement entered into between the FCI and the Respondents was executed on 17th March, 2017. According to the said Concession Agreement, the Respondents were required to fulfil certain conditions within 150 days, including providing performance security, securing financial closure, and obtaining land and railway siding approvals.

4. It is averred that the Respondents failed to comply with the terms of the respective Concession Agreements that they entered into. It is the case of

FCI that although the silos were completed by 13th June, 2020, the associated railway siding was only finished on 8th November, 2023. The non-compliance by the Respondents led to losses to the Petitioner. The FCI claims damages due to delay by the Respondents in meeting the conditions precedent and completing the railway siding as required by the Concession Agreements. In view of this, High-Level Committee of FCI decided to impose uncapped damages at the rate of 0.25% of the performance security per day until completion. The said penalties were sought to be enforced, collected through EMIs from the storage charges. The Petitioner then sent legal notices to both Respondents on various dates, including 28th August, 2023 and 6th September, 2023.

5. Subsequently the Respondent No.1 approached the Court of ld. Additional District Judge, Commercial Court, Chandigarh under Section 9 of the Act. The ld. Additional District Judge, Commercial Court Chandigarh, vide order dated 21st September, 2023, granted a stay against the Petitioner from obtaining an unconditional undertaking as also collecting damages from Respondent No.1 and restraining the Petitioner from interfering with the Agreement till the next date of hearing.

6. On 23rd September, 2023 – Respondent No.1 invoked arbitration and appointed the nominee Arbitrator for adjudication of the disputes. Thereafter, the Petitioner appointed its nominee Arbitrator on 19th October, 2023. The Presiding Arbitrator was to be then appointed by the two nominee arbitrators. On 2nd December, 2023, the Respondents wrote to ICADR seeking appointment of the third Arbitrator on the ground that the two ld. Arbitrators appointed by the parties had not agreed on appointing a third

Arbitrator.

7. In view thereof, ICADR, without issuing any notice to Petitioner, unilaterally appointed the third Arbitrator (Presiding Arbitrator) on 8th December, 2023. Since the said third Arbitrator recused, ICADR appointed another Arbitrator, again, without consent of the Petitioner. Aggrieved by the Presiding Arbitrator being appointed by the ICADR, the Petitioner has filed the present petitions.

8. The arbitration clause in the Concession Agreements entered into between the parties is as under:

> *"25.3 Arbitration*
> *25.3.1 Any dispute is not resolved by mediation, as provided in clause 25.2, shall be resolved in arbitration by a board of Arbitrators appointed in accordance with Clause 25.3.2. the arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the "Rules') or such other rules as may be mutually agreed by the parties, and shall be subject to the provisions of the Arbitration & Conciliation Act, 1996 (No.26 of 1996) The venue of such arbitration shall be English*
> *25.3.2 There shall be a Board of three Arbitrators, of whom each party shall select one, and the third arbitrator shall be appointed by the two arbitrators so selected, and in the event of disagreement between the two arbitrators, the appointment shall be made in accordance with the Rules."*

9. Vide order dated 10th January, 2024 this Court had considered the issues raised in the petitions and had recorded as under:

> *"6. The two issues which have been raised would require consideration as both the clauses and the*

correspondence would have to be perused by the Court in order to determine:

i. Whether the ICADR is an agreed organization or institution in the arbitration clause and;

ii. Whether there was a disagreement between the two nominee arbitrators or not.

7. Another issue which arises in the opinion of this Court is whether upon receiving a letter for appointment of a third arbitrator on behalf of Respondent No. l, whether ICADR has a duty to call upon the Petitioner's stand in this regard."

10. On 30th April, 2024, ld. Counsels for Respondent raised an issue with regard to territorial jurisdiction and seat & venue of arbitration proceedings. It was also contended that petitions under Section 9 of the Act were pending before the ld. Commercial Court in Chandigarh, Punjab. In addition, it was noticed that a new Legislation was enacted in the meantime viz., the India International Arbitration Centre Act, 2019, which took over the activities of ICADR. In view of the objections raised, the Court vide order dated 30th April, 2024 had directed as under:

"5. In addition, Id. Counsel for the parties may also examine the India International Arbitration Centre Act, 2019 (hereinafter, 'IIAC Act'), and submit as to whether, after the constitution of the New Delhi International Arbitration Centre pursuant to the IIAC Act, the ICADR can continue to conduct arbitrations, or if the proceedings would be required to be transferred to the India International Arbitration Centre (IIAC)"

11. Mr. Sandeep Sethi, ld. Senior Counsel appearing for the Respondents has made the following submissions:

(i) The Respondents appointed its Arbitrator on 23rd September, 2023 and on 9th October, 2023, the Petitioner appointed its Arbitrator.

(ii) Within 30 days from that stage, the Presiding Arbitrator ought to have been agreed between the parties.

(iii) However, since the same was not agreed, the Respondents wrote to the International Centre for Alternative Dispute Resolution (*'ICADR'*) on 9th November, 2023, seeking appointment of the Presiding Arbitrator. On 8th December, 2023, the Presiding Arbitrator was appointed, who initially recused. Thereafter, the substitute Arbitrator was appointed.

12. As per the submission on behalf of the Respondents, since ICADR was specifically mentioned in the arbitration clause 25.3.1, the arbitration proceedings shall be governed by the said ICADR Rules. There were no other rules agreed upon between the parties. There was no challenge raised by the Petitioner, when the initially Presiding Officer was appointed, itself shows that the Petitioner agreed for the ICADR's jurisdiction to appoint the Presiding Arbitrator.

13. Further, it was also submitted that vide notice dated 7th September, 2023, Respondents had requested the Petitioner to amicably settle the matter as per Clause 25.2 of the Concession Agreement. However, the Petitioner did not respond to the same. Further, in view of the losses incurred by the Respondents, they were constrained to approach the ld. Additional District Judge, Chandigarh. It is also asserted by the Respondents that none of allegations made by the Petitioner can be justified reason for interference

under Section 14 of the Act. Reliance is placed on ***Swadesh Kumar Aggarwal v. Dinesh Kumar Aggarwal [(2022) 10 SCC 235]*** and ***Chennai Metro Rail Limited Administrative Building v. Transtonnelstroy Afcons (JV) & Anr. [2023 SCC OnLine SC 1370]*** to argue that Section 14 of the Act is applicable only if the Arbitrator becomes *de jure* or *de facto* unable to perform his functions. Relevant portions of ***Chennai Metro Rail (supra)*** are set out below:

> *"27. Section 13 (1) deals with the challenge procedure and enables parties to agree on a procedure to challenge the arbitrator. By Section 13(2), if there is no agreement, the party who intends to challenge the arbitrator has to within 15 days after becoming aware of the tribunal's constitution or within fifteen days after becoming aware of any circumstances referred to in Section 12(3) apply in writing to the reasons for challenge to a tribunal. Section 12(3), as noticed earlier, states that the grounds of challenge to existence of circumstances, giving rise to justifiable doubts about tribunal's independence or impartiality. Section 13(3) states that if the arbitrator does not withdraw or the other party does not in the absence of the other party agreeing according to the challenge; the tribunal has to decide upon it. By Section 13(4) if the challenge is unsuccessful the tribunal would continue with the proceedings and finalize its award. Section 13(5) states that any party can challenge the arbitrator's decision, after the award is made under Section 34. Section 13(6) keeps open the issue of fee to be payable to the arbitrator in the event, the award is set aside on the ground under Section 13(5).*
>
> *28. <u>Section 14 deals with the contingency of failure or impossibility of the arbitrator or tribunal to act and stipulates that the mandate of an arbitrator shall</u>*

terminate and he shall be substituted by another "if he becomes de jure or de facto unable to perform its functions or for other reasons fails to act without undue delay or withdraws from his office or parties agrees to the termination of his mandate". By Section 14(2) if a controversy remains, concerning the grounds referred to in Section 14 (1), the Court may be approached by the parties to decide upon the issue of termination on mandate."

Thus, as per the Respondents, Section 14 petition does not lie in the present facts and circumstances. It is the submission on behalf of the Respondents that, as per Clause 25.3 of the Concession Agreement would inherently imply applicability of ICADR rules and thus, the present petitions cannot be considered for appointment of an Arbitrator by this Court as the Presiding Arbitrator had already been appointed by the ICADR.

14. Mr. Pudussery, ld. Counsel for Petitioner submitted that that there was no agreement only for the ICADR Rules to apply. In addition, as per Clause 25.3.2 of the Concession Agreement, it was his submission that there was no disagreement between the two nominee arbitrators. Further, with regard to the objection with respect to territorial jurisdiction, he submitted that Petitioners had taken the objection of territorial jurisdiction in the Section 9 petition as well. He stated that as per the agreement, the seat of arbitration is clearly in Delhi.

15. Further, it was submitted by ld. Counsel for Petitioner that the Respondents had not invoked arbitration in accordance with Rule 3 of the ICADR Arbitration Rules as the first invocation of arbitration vide letter dated 2nd September, 2023 was not addressed to ICADR. Thus, according to him, ICADR had no jurisdiction in the present petitions to appoint third

Arbitrator. He submitted that only this Court can appoint a third Arbitrator under Section 11(6) of the Act and ICADR could not have appointed the third Arbitrator. Reliance is placed on ***Datar Switchgears Ltd. v. Tata Finance Ltd. [(2000) 8 SCC 151]***. Ld. Counsel also submitted that this Court under Section 14(2) of the Act has the jurisdiction to decide the present issue. With regard to "venue" of arbitration, ld. Counsel relied on the decision in ***BSG-SGS-Soma v. NHPC Limited [(2020) 4 SCC 234]***, to state that in absence of specific venue in the agreement, the stated venue would be juridical seat of the arbitral proceedings. The relevant paragraph of the said judgement is set out below:

> "*61. It will thus be seen that wherever there is an express designation of a "venue", and no designation of any alternative place as the "seat", combined with a supranational body of rules governing the arbitration, and no other significant contrary indicia, the inexorable conclusion is that the stated venue is actually the juridical seat of the arbitral proceeding*."

Ld. Counsel for the Petitioner concluded that this Court has the jurisdiction to adjudicate the disputes and appoint an Arbitrator as per Section 14 of the Act.

16. On the various contentions raised in this matter, the Court was proceeding to pass orders. The first factor that is needed to be considered is whether the ICADR even had jurisdiction to appoint the Presiding Arbitrator. Clearly, as per Rule 3 of the ICADR Rules, if the parties wish to proceed under the said Rules, the initial invocation itself has to be addressed to the ICADR. The said Rule reads:

> "*3. **Notice of request for arbitration**.— (1) The **<u>claimant initiating the arbitration shall give a notice of request</u>***

> ***<u>for arbitration to the respondent and to the ICADR</u>***.
> *(2) The arbitral proceedings commence on the date on which the notice of request for arbitration is received by the respondent.*
> *(3) A notice of request for arbitration shall include the following:-*
> *(a) a request that the dispute be referred to arbitration;*
> *(b) the names and addresses of the parties to the dispute;*
> *(c) a reference to the contract out of or in relation to which the dispute has arisen;*
> *(d) a reference to the arbitration clause or arbitration agreement relied upon;*
> *(e) the general nature of the claim and where the claim is or can be quantified in terms of money, the amount of the claim;*
> *(f) the relief or remedy sought;*
> *(g) the preferred number of arbitrators, if not already agreed upon."*

17. Secondly, there is no communication on record which demonstrates that the two Presiding Arbitrators had not arrived at a consensus for appointing the third Presiding Arbitrator. The ICADR could not have usurped the jurisdiction of the said two Arbitrators and it ought to have given an opportunity to the said two Arbitrators to agree on a name. Moreover, the ICADR ought to have given adequate sanctity to the fact that as per the clause in the Concession Agreement, the two Arbitrators had the prerogative of appointing the presiding Arbitrator. There is not a single email or document or letter showing that the two nominee Arbitrators had any disagreement. Moreover, FCI is clearly having reservations as to the manner in which ICADR has, without giving FCI or the nominee Arbitrators any notice, simply proceeded to appoint a presiding Arbitrator, with great

haste.

18. This Court is, therefore, clearly of the opinion that an independent Arbitrator ought to be appointed as the Presiding Arbitrator. At this stage, ld. Senior Counsel for the Respondents has agreed that the Presiding Arbitrator may be substituted, without prejudice and has suggested a name of a Retd. Judge of this Court. Thus, the remaining contentions raised by the parties are not being considered at this stage, and are left open to be considered in an appropriate case.

19. Accordingly, with the consent of parties, this Court appoints **Justice Manmohan Singh (Retd.) (M:9717495001)** as the Presiding Arbitrator in both these matters. The Arbitral Tribunal shall now consist of the following persons –

a. Justice Manmohan Singh (Retd) – Presiding Arbitrator
b. Justice K. Ramamoorthy (Retd) – Nominee Arbitrator of FCI
c. Prof. Ashwani Kumar Bansal – Nominee Arbitrator of Respondents.

20. The Arbitral tribunal shall now enter reference expeditiously. Copy of this order be communicated to the members of the Arbitral Tribunal by the Registry.

21. Both the petitions are disposed of. All pending applications are also disposed of.

PRATHIBA M. SINGH, J.

MAY 24, 2024/*dk/bh*
(corrected and released on 31st May, 2024)