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

+ **ARB.P. 709/2024 & I.A. 38766/2024**

M/S S.A YADAV

.....Petitioner

Through: Ms. Sonal Alagh, Ms. Akshita
Phutela, Mr. Aviral Kapoor and
Mr. Arpit Dhingra, Advocates.

versus

IRCON INTERNATIONAL LIMITED

.....Respondent

Through: Mr. M. P. Devnath, Mr. Abhishek
Anand, Mr. Rahul Kumar and Mr.
Srinath R.A. Iyengar, Advocates.

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

ORDER

% **12.09.2024**

1. By way of this petition under Section 11 of the Arbitration and Conciliation Act, 1996 [“the Act”], the petitioner has approached this Court for appointment of an arbitral tribunal to adjudicate disputes between the parties arising out of a Letter of Acceptance dated 12.07.2017 [“the Agreement”], issued by the respondent herein.
2. The Agreement was entered into on the basis of a tender dated 15.05.2017 issued by the respondent, in which the petitioner’s bid was found to be the lowest. The Agreement was subject to General Conditions of Contract [“GCC”], which provide for arbitration in the event parties are unable to settle their claims mutually or by conciliation [Clause 73].
3. The relevant parts of the dispute settlement clause contained in the



GCC provide as follows:

“73.0 SETTLEMENT OF DISPUTES

*All disputes and differences of any kind whatsoever arising out of or in connection with the contract, whether during the progress of the work or after its completion and whether before or after the determination of the contract, shall be settled as under, provided that matters for which provision has been made in **clauses 20.3, 36.5, 40.1, 40.2, 49.7, 50.0, 51.0, 59.0, 61.2 and 72.2** of General Conditions of Contract or in any clause of the Special Conditions of Contract shall be deemed as 'excepted matters' (matters not arbitrable) and decision of the Employer thereon, shall be final and binding on the contractor; provided further that 'excepted matters' shall stand specifically excluded from the purview of this clause.*

73.1 Mutual Settlement

All such disputes or differences shall in the first place be referred by the Contractor to the Employer in writing for resolving the same through mutual discussions, negotiations, deliberation etc. associating representatives from both the sides and concerted efforts shall be made for reaching amicable settlement of disputes or differences.

73.1 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 fail, 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.

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

In cases where the total value of all claims/counter-claims in question added together does not exceed '**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 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 '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 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 arbitrator sit 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.

[Emphasis supplied]



4. Although the clause provides for arbitration by a tribunal of three officers of the respondent if the claims are in excess of Rs. 2 crores. Mr. M. P. Devnath, learned counsel for the respondent, does not dispute that such a tribunal would be impermissible in view of the judgments of the Supreme Court in *TRF Limited vs. Energo Engineering Projects Limited* [(2017) 8 SCC 377] and *Perkins Eastman Architects DPC & Anr. vs. HSCC (India) Limited* [(2020) 20 SCC 760].

5. Disputes having been arisen between the parties, the petitioner claims to have invoked arbitration by a legal notice dated 11.04.2023. In its reply dated 29.05.2023, the respondent sought to assert that the parties are required to attempt a mutual settlement under the dispute resolution clause and the conciliation/arbitration procedure can only be invoked upon failure of the settlement.

6. I have heard learned counsel for the parties.

7. The plea asserted by Mr. Devnath is on the same lines as taken in the respondent's letter dated 29.05.2023 i.e., that the invocation of arbitration by the petitioner is premature as the procedures for settlement and conciliation have been bypassed.

8. In response to this submission, Ms. Sonal Alagh, learned counsel for the petitioner, points out that the disputes between the parties commenced with a letter of the respondent dated 01.02.2020, by which seven days' notice for termination of the contract under clause 50 of the GCC was served upon the petitioner. The petitioner addressed a letter to the Chief General Mangar dated 07.02.2020, placing its case before the respondent and stating that a dispute has thus arisen under clause 73 of the GCC. The respondent was, therefore, requested to resolve the dispute,



failing which the petitioner would be compelled to take further steps. The respondent's reply dated 14.02.2020 specifically referred to the communication dated 07.02.2020. Although the respondent disputed the contentions of the petitioner, it did not respond to the petitioner's request for settlement of the dispute. Instead, the respondent purported to issue 48 hours' notice in terms of clause 50 of the GCC for termination of the contract. The petitioner responded on the next day, i.e., 15.02.2020, again requesting the respondent to resolve the matter as per clause 73 of the GCC. Without referring to the letter dated 15.02.2020, the respondent addressed a communication dated 17.02.2020, terminating the contract.

9. Even thereafter, on 28.04.2020, in a letter which has been placed on record by the respondent itself, the petitioner has referred to its earlier communication and sought an opportunity to put its case before the Chairman and Managing Director of the respondent under clause 73.2 of the GCC. The respondent's reply dated 07.05.2020 records that the action taken by the respondent was an "excepted matter" and, therefore, was not arbitrable. It is also stated that petitioner's grievances have been analysed and no essence has been found therein. However, it is once again stated that the petitioner had not made any effort at the mutual settlement within 120 days of the submission of the monthly statement as required under clause 73 of the GCC.

10. The matter rested there for the next two years, which coincided with the Covid-19 pandemic, following which the respondent raised a demand upon the petitioner by a letter dated 25.11.2022, claiming recovery of a sum of Rs. 1,41,46,573/- from the petitioner. The claim was disputed by the petitioner, by a legal notice dated 08.12.2022, and the



arbitration clause was invoked by the aforesaid letter dated 11.04.2023.

11. Having regard to the aforesaid communication, I find the respondent's position untenable. It is clear that the petitioner sought mutual settlement of the disputes on at least three occasions, by the letters dated 07.02.2020, 15.02.2020 and 28.04.2020. The respondent's replies did not address these requests in any manner and, in fact, persisted in precipitating the disputes by giving further notices of termination, and ultimately terminating the agreement. Whatever the merits of the matter, which this Court is not called upon to adjudicate at this stage, the respondent's claim of a premature invocation is certainly belied by this conduct. In fact, it is evident that the respondent has also raised monetary claims against the petitioner without making any attempt at settlement.

12. The scope of adjudication under Section 11 of the Act is extremely limited and the referral Court is only required to consider *prima facie* whether an arbitration agreement exists between the parties, which is undisputed in this case. The contentions of the respondent with regard to arbitrability are to be left to the arbitral tribunal, as clarified in the recent judgments of the Supreme Court in *SBI General Insurance Co. Ltd. v. Krish Spinning* [2024 SCC OnLine SC 1754] and *Cox & Kings Ltd. v. SAP India Pvt. Ltd. & Anr.* [Arbitration Petition No. 38 of 2020 dated 09.09.2024].

13. For the aforesaid reasons, the petition is allowed. In the notice invoking arbitration, the petitioner has nominated Mr. Chandrasekhar Vinayak Wakankar, Advocate, as an Arbitrator. The task before the Court at this stage, therefore, is to appoint an Arbitrator in lieu of the respondent's nominee.



14. Hon'ble Ms. Justice Asha Menon, former Judge of this Court [Tel: 9910384664], is appointed as the Arbitrator, in lieu of the respondent's nominee. Both the Arbitrators are requested to nominate the presiding Arbitrator in accordance with law. The learned Arbitrators are requested to furnish declarations under Section 12 of the Act, prior to entering upon the reference.

15. With the consent of learned counsel for the parties, it is directed that the arbitral proceedings will be held under the aegis of Delhi International Arbitration Centre, Delhi High Court, Shershah Road, New Delhi-110503 ["DIAC"], and will be governed by the Rules of DIAC, including as to the remuneration of the learned Arbitral Tribunal.

16. All rights and contentions of the parties are left open for adjudication before the arbitral tribunal.

17. This petition, alongwith the pending application, is disposed of in the aforesaid terms. The respondent will pay costs of this petition, assessed at Rs. 30,000/-, to the petitioner.

PRATEEK JALAN, J

SEPTEMBER 12, 2024

MR/