

Bsc Projects Private Limited vs Ircon International Limited on 22 March, 2023

Author: Yashwant Varma

Bench: Yashwant Varma

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+ IN THE HIGH COURT OF DELHI AT NEW DELHI
ARB.P. 39/2023
BSC PROJECTS PRIVATE LIMITED Petitioner
Through: Mr. Bhupesh Narula, Adv.

versus

IRCON INTERNATIONAL LIMITED Respondent
Through: Mr. Vivek Kumar Verma, Adv.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
ORDER

% 22.03.2023

1. This petition under Section 11 of the Arbitration and Conciliation Act, 1996 [the Act] has been instituted for the Court invoking its powers conferred by Section 11 of the Act since the respondent has failed to abide by the appointment procedure. The existence of the arbitration clause as contained in the General Conditions of Contract [GCC] is not disputed. For the sake of clarity the said clause is reproduced hereinbelow: -

"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 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 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."

2. The respondent has firstly taken up the issue of the petitioner / contractor having failed to complete the work in accordance with the terms of the contract and has thus contended that the claims as raised are not liable to be countenanced.

3. Mr. Narula, learned counsel appearing for the petitioner, however, draws the attention of the Court to page no.54 of the paper book and more particularly to the Completion Certificate dated 14 June 2021 which is stated to have been issued by the respondent itself. It becomes pertinent to note that the said certificate refers to the actual completion date as 31 December 2020. However, this aspect is one which need not be finally determined by this Court at this stage since all contentions of respective parties in this respect shall be open to be addressed before the Arbitral Tribunal.

4. That takes the Court to the procedures which were initiated by the petitioner for the purposes of settlement of disputes. On the record is a letter of 21 November 2022 written by the petitioner calling upon the respondent to take appropriate steps for the resolution of the disputes which had arisen. It had also made a request for an authorized representative being duly deputed to undertake a joint measurement exercise. It was, however, pointed out that despite the aforesaid request having been made, the respondent failed to act in terms thereof. The request for the constitution of the Arbitral Tribunal since mutual settlement was not being resorted to was again reiterated by the petitioner in its communication dated 30 November 2022. However and since the respondent neither agreed to undertake the mutual settlement, the petitioner was constrained to issue a notice under Section 21 on 13 December 2022. Along with the said notice, the petitioner also indicated the name of its nominee arbitrator.

5. From the side of the respondent, it is contended that the arbitration clause clearly envisages a process of mutual settlement being undertaken before the matter is ultimately referred to arbitration.

6. It would be relevant to note that the arbitration clause refers to parties exploring the possibility of a mutual settlement and in case of a failure to arrive at such a settlement, the Arbitral Tribunal is liable to be constituted. Insofar as the said issue is concerned, the Court notes that a learned Judge in Oasis Projects Ltd. v. Managing Director, National Highway and Infrastructure Development Corporation Limited, [2023 SCC OnLine Del 645] has recently held that those processes would clearly not be mandatory.

7. That takes the Court then to the question of the proceedings liable to be initiated for the purposes of constitution of the Arbitral Tribunal itself. As per Clause 73.4(a)(ii), the employer is to forward a panel of more than three names to the contractor within sixty days from the day when a written and valid demand for arbitration is received. From the panel which is so provided, the contractor is required to suggest to the Chairman and Managing Director at least two names. The Chairman and

Managing Director, thereafter, is empowered to appoint a nominee arbitrator from at least one out of the names as suggested. That Arbitrator would be recognised as the contractor's nominee.

8. Quite apart from the fact that the respondent has abjectly failed to act in terms of the aforesaid clause since no panel had been provided for the consideration of the petitioner, the Court observes that Clause 73.4(a)(ii) clearly does not appear to leave any element of choice in the hands of the contractor. It is ultimately for the Chairman and Managing Director to make that nomination.

context that the validity of the arbitration and appointment process itself is assailed by Mr. Narula.

9. According to Mr. Narula, while construing the very same clause, the Court in *M/S CMM Infraprojects LTD. vs. Ircon International LTD.*, [2021 SCC OnLine Del 5656] has made the following pertinent observations: -

"40. In *CORE* (supra), Clause 64 of the GCC which dealt with the procedure of resolution of disputes and provided for demand for arbitration, underwent a change, subsequent to the coming into force of the Arbitration and Conciliation (Amendment) Act, 2015. The Ministry of Railways made a modification to Clause 64 of the GCC, and the Railway Board issued a notification to that effect. The modified clauses which were applicable to the facts of the said case on account of the value of the work contract being more than Rs. 1 Crore, were Clauses 64(b)(a)(ii) and 64(3)(b) of the GCC. As noted above, the former pertained to situations wherein the applicability of Section 12(5) was waived off and the latter pertained to situations where there was no waiver.

41. On considering the afore-noted clauses, the Supreme Court observed that since after coming into force of the Amendment Act of 2015, Clause 64 of GCC had been modified, the High Court was not justified in appointing an independent Sole Arbitrator. Accordingly, the parties were relegated to the procedure of appointment under Clause 64(3)(b) of the GCC, which was found to be a valid clause. The crux of the Supreme Court's reasoning is that ".....Since the respondent has been given the power to select two names from out of the four names of the panel, the power of the appellant nominating its arbitrator gets counter-balanced by the power of choice given to the respondent. Thus, the power of the General Manager to nominate the arbitrator is counter-balanced by the power of the respondent to select any of the two nominees from out of the four names suggested from the panel of the retired officers. In view of the modified Clauses 64(3)(a)(ii) and 64(3)(b) of GCC, it cannot therefore be said that the General Manager has become ineligible to act as the arbitrator."

42. In contrast, in the instant case the relevant arbitration clause has not been modified. Thus, if we were to do a conjoint reading of Clauses 73.4(a)(ii) and 73.4(a)(vi), it is manifest that the arbitration clause contemplates appointment of serving officials of the Respondent as arbitrators. The clause therefore as worded currently, runs foul with Section 12(5) and Schedule VII of the Act. Thus, *CORE* (supra) is distinguishable on facts and is not applicable.

43. The other anomaly which merits consideration is that the Managing Director of the Respondent, who has a direct interest in members of the Arbitral Tribunal and also plays a role in the appointment of the 3rd arbitrator i.e., the contractor's nominee. This is against the spirit of the judgment in Perkins Eastman (supra). This argument was perhaps not raised in CORE (supra)."

10. The Court finds from a reading of the decision in CMM Infraprojects that the learned Judge has for reasons recorded ultimately found that Clause 73.4(a)(ii) stands on a completely distinct and different footing from the clause which had fallen for consideration before the Supreme Court in Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML (JV), [(2020) 14 SCC 712]. Central Organisation for Railway Electrification had upheld the appointment process since the contractor in terms of the arbitration agreement did have the requisite right to make a choice out of a broad-based panel. While it may be only observed that Perkins was cited for the consideration of the Bench which had decided Central Organisation for Railway Electrification [and which appears to have escaped the attention of the Court while rendering judgment on CMM Infraproject], the Supreme Court had on an ultimate analysis found that the arbitration clause was not only distinct from the one which had been disapproved, it had on an ultimate analysis found that the choice conferred on parties was sufficient to uphold the appointment process. That clearly does not appear to be the position which obtains here when one bears in mind that it is the Chairman and Managing Director who was to ultimately make the appointment for and on behalf of both sides. Additionally, the clause also contemplated serving Railway officers being appointed as Arbitrators.

11. Accordingly, and for all the aforesaid reasons, the instant petition is allowed.

12. The Court notes that the petitioner has already nominated Shri M.C. Singhal as its nominee arbitrator.

13. Since the respondent has failed to act in terms of the arbitration agreement, the Court hereby appoints Mr. Justice Vineet Saran [Official Address: 65 Lodhi Estate, New Delhi - 110003] [Mobile No. 9937233336] [email: vineetsaranjustice@gmail.com] as the nominee on behalf of the respondent.

14. The two nominated arbitrators shall now proceed to designate a Presiding Arbitrator.

15. This is subject to the Arbitrator named above making the necessary disclosure under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act.

16. The fees of the arbitrator shall be decided according to the Fourth Schedule of the Act.

YASHWANT VARMA, J.

MARCH 22, 2023 bh