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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ARB.P. 639/2016

JKM- NKC (JV)

..... Petitioner

Through Mr J.P. Sengh, Senior Advocate with
Mr Nitesh Jain, Mr Abhinav Mukhz
and Ms Manisha Mehta, Advs.

versus

NATIONAL HIGHWAY AUTHORITY OF INDIA & ANR.

..... Respondents

Through Mr S.K. Maniktala, Mr Swetab
Kumar, Mr Atul Sheopuri and Mr
Vinod Kumar, Advs. for R1
Mr Praveen Kumar Jain with Mr
Naveen Kumar Jain and Ms Sheetal
Raghuvanshi, Advs. for R2

CORAM: JUSTICE S.MURALIDHAR

ORDER

22.12.2016

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1. By this petition under Section 11 (6) of Arbitration and Conciliation Act, 1996 ('Act'), the Petitioner - JKM- NKC (JV) seeks the appointment of an Arbitrator on behalf of the Respondent National Highways Authority of India (NHAI) as well as the Presiding Arbitrator to complete the constitution of the Arbitral Tribunal (AT) to adjudicate the disputes between the parties arising out of the Contract dated 30th September, 2011 for construction of 4 Lane road for Km 165.400 to Km 190.587 of Jatinga junction to Harangajo section of NH- 54 in the State of Assam.

2. In terms of Clause 67.1 of the Condition of Particular Application ('CoPA') of the Contract, the disputes between the parties were first referred to Dispute Review Board (DRB), the decision of which was not acceptable either to the Petitioner or the NHAI. The NHAI, in the first instance, wrote a letter dated 11th January 2016 proposing that the disputes be referred to arbitration. In response thereto, the Petitioner on 27th January 2016 notified its intention to commence arbitration and set out its claims. By a letter dated 27th February 2016, the Petitioner pointed out to the Respondent that it had not yet nominated its Arbitrator. The Petitioner on its part, by the same letter, nominated Mr Madan Mohan Sangal as its nominee Arbitrator and furnished his details to the Respondent.

3. Although within 30 days of expressing its intention to refer the disputes to arbitration, the NHAI had to nominate its arbitrator, it decided to opt for an amicable settlement. On 16th March 2016, NHAI wrote to the Petitioner making a proposal in that regard. By its letter dated 23rd March 2016, the Petitioner agreed to the proposal but made it clear that it was without prejudice to its rights as per the contract between the parties.

4. The subsequent correspondence between the parties show that the attempts at an amicable settlement failed. With the time running out, the Petitioner wrote to the Director General (Road Development) & Special Security, Ministry of Road Transport and Highways (hereinafter 'DG'), with a copy to the NHAI, asking him to appoint an Arbitrator on behalf of the NHAI in terms of Sub-Clause 67.3 (v) of the CoPA of the Contract.

5. The NHAI then wrote to the DG on 8th April 2016 requesting that the issue of appointment of an Arbitrator for the NHAI and the constitution of the AT should be kept on hold till the outcome of amicable settlement attained finality. The Petitioner by letter dated 20th April 2016 reiterated its request to the DG to nominate an Arbitrator on behalf of the NHAI. Therein the Petitioner pointed out that the Clause 67.2 of the Contract which provides for an amicable settlement had in fact been deleted and, therefore, the process of amicable settlement amicable settlement was outside the ambit of the contract agreement and that in any case it cannot circumvent the arbitration process.

6. Another request was sent on 12th May 2016 by the Petitioner to the DG. During the entire period, there was no nomination of any arbitrator by the NHAI.

7. Thereafter on 13th May 2016, the NHAI nominated Mr S.P.S. Jain as its nominee arbitrator.

8. Mr. SPS Jain and Mr. Sangal were unable to agree on the name of the third arbitrator. A letter was written by NHAI to the DG on 2nd August 2016 stating that a Presiding Arbitrator should be appointed by the DG in terms of Clause 67.

9. Mr J.P. Sengh, learned senior counsel for the Petitioner, objections to the nomination made by NHAI of Mr SPS Jain on the ground that it was done beyond the time prescribed under Clause 67 for that purpose. He points out that the Petitioner had agreed to an amicable settlement while making it

clear that this was without prejudice to their rights under the contract and, therefore, there was no question of process of the constitution of the AT being suspended because of the amicable settlement.

10. Mr. S.K. Maniktala, learned counsel for NHAI, on the other hand, insisted that because the parties had agreed to go for an amicable settlement, the process of constitution of the AT had been kept in abeyance. He submits that NHAI having nominated its arbitrator, the Court can appoint the Presiding Arbitrator.

11. Having heard the learned counsel for the parties, the Court is of the view that the Respondent is not right in contending that the process of amicable settlement had the effect of placing the process of constitution of the AT under suspension. While the Petitioner consented to the amicable settlement, notwithstanding that the concerned clause that provided for it stood deleted in the contract between the parties, it did so without prejudice to its rights under the contract. The Petitioner made this explicit in its letter dated 23rd March 2016 to the NHAI.

12. Further, from the letters written by the Petitioner to the DG on 8th and 20th April 2016 it is evident that there was no possibility of an amicable settlement. The NHAI clearly failed to act within the time prescribed in the contract for appointing its nominee arbitrator.

13. Mr J.P. Sengh, learned Senior counsel for the Petitioner, has placed before the Court a list of five names of arbitrators empanelled by NHAI itself. From the said list the Court appoints Mr Govind Saran, a former

Director General, Road and Transport (RD) and Special Secretary, Ministry of Road Transport and Highways as the nominee Arbitrator of NHAI.

14. It is directed that within a period of 30 days, the nominee arbitrator of the Petitioner, Mr Madan Lal Sangal and Mr Govind Saran will finalize the name of third Presiding Arbitrator and thereafter the AT will proceed in accordance with law.

15. If there is any difficulty in complying with the above directions, it will be open to the parties to approach the Court.

16. The petition is disposed of in the above terms.

17. A copy of this order will be given *dasti* under the signatures of the Court Master to counsel for the parties.

S.MURALIDHAR, J

DECEMBER 22, 2016

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