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

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Judgment delivered on: 03.08.2017

+ **ARB.P. 22/2017**

AFCONS INFRASTRUCTURE LTD.

..... Petitioner

versus

RAIL VIKAS NIGAM LIMITED

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr Gopal Jain, Senior Advocate with Mr Manu Seshadri, Mr Ishan Bisht and Ms Kriti Awasthi, Advocates.

For the Respondent : Mr Anil Seth, Advocate.

**CORAM:-
HON'BLE MR JUSTICE SANJEEV SACHDEVA**

**JUDGMENT
03.08.2017**

SANJEEV SACHDEVA, J. (ORAL)

1. The petitioner by this petition under Section 11(6) of the Arbitration & Conciliation Act, 1996 seeks appointment/constitution of the Arbitral Tribunal.

2. The respondent issued Notice Inviting Tender dated 27.06.2011 inviting bids for the work of Package ANVI –“Construction of Viaduct including related works for 5.75 km length excluding station areas from Ch.247.00 to Ch.6400.00 between Kavi Subhash (New

Gharia) to VIP Bazar, in New Garia Airport Corridor of Kolkata Metro Railway Line.

3. The petitioner was successful bidder and was awarded the Contract.

4. During the course of execution of the work, certain disputes between the parties have arisen leading to the petitioner invoking the arbitration clause.

5. The arbitration clause between the parties, as contained in the General Conditions of Contract forming the part of Contract Agreement dated 12.12.2011, reads as under:-

“17.3 Arbitration

Any dispute in respect of which amicable settlement has not been reached arising between the Employer and the Domestic or Foreign Contractor related to any matter arising out of or connected with this contract, the disputes shall be settled in accordance with the Indian Arbitration Act, 1996 and any statutory modification or re-enactment thereof. Further, it is agreed between the parties as under:-

- (i) *Number of Arbitrators: The arbitral tribunal shall consist of 3 (Three) Arbitrators.*
- (ii) *Procedure for appointment of Arbitrators : The arbitrators shall be appointed as per following procedure :*
 - (a) *Employer will forward a panel of 5 names to the contractor and contractor will give his*

consent for any one name out of the panel to be appointed as one of the Arbitrators.

(b) Employer will decide the second Arbitrator out of the remaining four names in the panel as mentioned in Para(a) above.

(c) The third Arbitrator shall be chosen by the two Arbitrators so appointed by the parties and shall act as Presiding Arbitrator. In case of failure of the two Arbitrators appointed by the parties to reach upon consensus within a period of 30 days from the appointment of the Arbitrators subsequently appointed, then, upon the request of either or both parties, the presiding Arbitrator shall be appointed by the Managing Director, Rail Vikas Nigam Limited, New Delhi.

(iii) Qualification and Experience of Arbitrators: The arbitrators to be appointed shall have minimum qualification and experience as under:

(a) One member of the tribunal shall be necessarily a working (not below the rank of SAG) or a retired officer (retired not below the rank of SAG, age not exceeding 70 years and in reasonably good mental and physical fitness) of Indian Railway Accounts Service having experience in financial matters related to construction contracts.

(b) One member shall be a technical person having degree in Engineering and may be working (not below the rank of SAG) or retired officer (retired not below the rank of SAG, age not exceeding 70 years and in

reasonably good mental and physical fitness) of any Engineering service of Indian Railways or equivalent service in RVNL, and having knowledge and experience of the Railway working.

- (c) The Presiding Arbitrator shall necessarily be a serving railway/RVNL officer and he shall have same minimum qualification and experience as specified above for either of the two arbitrators.*
- (d) Out of 3 Arbitrators nor more than one shall be a retired officer.*
- (iv) No person other than the persons appointed as per above procedure and having above qualification and experience shall act as arbitrator.*
- (v) Neither party shall be limited in the proceedings before such arbitrators to the evidence nor did arguments previously put before.*
- (vi) The reference to arbitration may proceed, notwithstanding that the Works shall not then be or be alleged to be complete, provided always that the obligations of the Employer, the Engineer and the Contractor shall not be altered by the reason of the arbitration being conducted during the progress of the Works. Neither party shall be entitled to suspend the Works, nor shall payment to the Contractor be continued to be made as provided by the Contract.*
- (vii) Arbitration proceedings shall be held at New Delhi, India and the language of the arbitration proceedings and that of all documents and communications between the parties shall be in*

English.

- (viii) *The decision of the majority of arbitrators shall be final and bindings upon both parties. The expenses of the conciliator/arbitrators shall be as per the scales fixed by the employer from time to time and shall be shared equally by the Employer and the Contractor. However, the expenses incurred by each party in connection with the preparation, presentation will be borne by itself.*
- (ix) *All arbitration awards shall be in writing and shall state the reasons for the award.*

However, in case the contractor is a Public Sector Enterprise/Govt. Department, the dispute arising between the “Employer” and the “Contractor” shall be settled through Permanent Arbitration machinery (PMA) of the Department of Public Enterprise, Govt. of India as per prevailing rules, as stated in Sub-Clause 17.3.”

4. The Petitioner has impugned the legality and validity of the said clause. It is contended that the said clause, contravenes the mandate of the Act as amended by the Arbitration Conciliation (Amendment) Act, 2016, more particularly Section 12 of the Act. Further it is contended that respondent is disqualified from proposing or appointing an Arbitrator.

5. Learned counsel appearing for the respondent disputes the contention of the learned senior counsel for the petitioner and submits that the clause is legal and valid and binding between the parties

having been agreed to by the parties.

6. Without prejudice to the respective stand of the parties on the legality and validity of the said clause, on the suggestion by the Court, learned counsel for the parties have taken instructions and have concurred that Mr Justice A.K.Patnaik (Retired), former Judge of the Supreme Court of India, be appointed as the nominee arbitrator of the petitioner.

7. Accordingly, Mr Justice A.K.Patnaik (Retired), former Judge of the Supreme Court of India, is appointed as the nominee arbitrator of the petitioner.

8. The respondent shall nominate their Arbitrator within a period of two weeks from today. Both the Arbitrators shall concur an appointment of a Third Arbitrator. If respondent fails to appoint its nominee Arbitrator or if the Arbitrators fail to concur on appointment of a third Arbitrator, the petitioner would be at liberty to approach this Court.

9. The appointment of Arbitrators is subject to the Arbitrators making the necessary disclosure under Section 12 of the Act, of not being ineligible under Section 12(5) of the Act.

10. The parties are at liberty to approach the Arbitral Tribunal for elucidating the necessary disclosures and for further proceedings.

11. It is clarified that this Court has not examined the legality,

validity or otherwise of the arbitration clause and the nomination of the Tribunal has been done without prejudice to the rights and contentions of the parties. Since this Court has not examined the legality, validity or otherwise of the arbitration clause, the question of law is left open and this judgment shall not be treated as a precedent with regard to the question of law raised.

12. The Arbitrators shall adjudicate the claims of the petitioner and the counter-claims, if any, of the respondent. The Arbitral Tribunal shall fix its fee in consultation with the learned counsel for the parties.

13. The petition is accordingly disposed of.

14. Order *Dasti* under signatures of the Court Master.

SANJEEV SACHDEVA, J

AUGUST 03, 2017

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