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

+ ARB.P. 190/2017

OM VAJRAKAYA CONSTRUCTION CO. Petitioner

Through Mr.S.W.Haider, Advocate

versus

UNION OF INDIA Respondent

Through Mr.Amitava Poddar, Advocate

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

ORDER

% **24.05.2017**

1. The present petition is filed under Section 11 of the Arbitration & Conciliation Act, 1996 (*hereinafter referred to as 'the Act'*) for appointment of a sole arbitrator to adjudicate the claims between the parties.

2. It is the case of the petitioner that on 07.04.2011, the work pertaining to Earthwork in filling for embankment etc. was awarded to the petitioner for Rs.14,23,77,786/-. Disputes having been arisen between the parties. The petitioner invoked the arbitration clause. Vide notice dated 12.04.2016, the petitioner requested the respondent in terms of the clause 64 of the General Conditions of the Contract as applicable to the parties to make the payment as stated or otherwise the arbitral tribunal be constituted. As no steps were taken by the respondent, the petitioner has filed the present petition on 10.03.2017.

3. I have heard the learned counsel for the parties.

4. The learned counsel for the respondent admits that the respondent has not appointed any arbitrator in the present case. The only submission is that

in another matter pending between the parties, an arbitrator has been appointed by the respondent.

5. The relevant clause of the General Conditions of Contract reads as follows:

“64(3)(a)(ii) -- In cases not covered by Clause 64(3)(a)(i), the Arbitral Tribunal shall consist of a panel of three Gazetted Railway Officers not below JA grade, as the arbitrators. For this purpose, the Railway will send a panel of more than 3 names of Gazetted Railway Officers of one or more departments of the Railway to the contractor who will be asked to suggest to General Manager upto 2 names out of panel for appointment as contractor's nominee. The General Manger 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 3 arbitrators so appointed. While nominating the arbitrators, it will be necessary to ensure that one of them is from the Accounts department. An officer of Selection Grade of the Accounts department shall be considered of equal status to the officers in SA Grade of other departments of the Railways for the purpose of appointment of arbitrators.”

6. The respondent admits that the aforesaid clause is applicable between the parties. As per the above clause, the respondent was to send a panel of three Gazetted Railway Officers to the petitioner who was to suggest to the General Manager upto 2 names out of panel for appointment as petitioner's nominee. The General Manger shall appoint at least one out of them as the petitioner's nominee and will also simultaneously appoint the balance number of arbitrators either from the panel or from outside the panel. The respondent have failed to do so despite service of notice.

7. The Supreme Court in the case of ***Datar Switchgears Ltd. Vs. Tata Finance Ltd. & Anr., (2000) 8 SCC 151***, held as follows:-

“19. So far as cases falling Under Section 11(6) are conceded - such as the one before us - no time limit has been prescribed under the Act, whereas a period of 30 days has been prescribed Under Section 11(4) and Section 11(5) of the Act. In our view, therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the Court under Section 11, that would be sufficient. In other words, in cases arising Under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application Under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator Under Section 11(6) is forfeited.”

8. The above effect is also the judgment of the Supreme Court in the case of ***Deep Trading Company vs. Indian Oil Corporation and Ors., (2013) 4 SCC 35/(MANU/SC/0275/2013)***.

9. Keeping in view the above legal position it is clear that the respondent has lost the right to nominate their Arbitrators. I appoint Mr Justice Anil Kumar (Retd.) Mobile No 9818000140) as the sole arbitrator to adjudicate the claims between the parties. The learned arbitrator may take steps in terms of Section 12(a) of the Act. The learned arbitrator shall fix his fees in consultation with the learned counsel for the parties.

10. Parties are directed to appear before the learned arbitrator on 12.07.2017 at 4.00 p.m.

11. The petition is accordingly disposed of.

JAYANT NATH, J.

MAY 24, 2017/v