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

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Judgment delivered on: 21.08.2017

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ARB.P. 825/2016

AFCONS INFRASTRUCTURE LIMITED

..... Petitioner

versus

IRCON INTERNATIONAL LIMITED

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr. Manu Seshadri and Mr Ishan Bisht

For the Respondent : Mr Dinesh Agnani, Senior Advocate with Ms Leena Tuteja

CORAM:-

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

21.08.2017

SANJEEV SACHDEVA, J. (ORAL)

1. The petitioner by this petition under Section 11 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the Act') seeks appointment of an Arbitrator on behalf of the respondent.
2. Respondent issued Notice Inviting Tender dated 25.07.2013 calling for bids for the work of Jammu & Kashmir Rail link Project- Dharam Quazigund Section VIII, Krawah, Post : Banihal, District Ramban (J&K) Pin- 182146.
3. The petitioner was a successful bidder for the project and entered into a letter of award with the respondent.

4. Disputes have arisen during the execution of the Contract leading to the petitioner invoking arbitration by notice dated 19.11.2016.

5. Clause 62 of the Notice Inviting Tender contains an Arbitration Clause. The relevant clause 62.4 of the said clause 62 reads as under:-

“62.4 (a) (i) Sole Conciliator/Sole Arbitrator:

In cases where the total value of all claims/counter-claims in question added together does not exceed Rs.2.00 Crore (Rupees Two Crores), the Arbitral Tribunal shall consist of a sole arbitrator who shall be an officer of N.Rly, not below J.A.grade level officer (Approved list of N.Rly), nominated by the Chairman cum Managing Director.

The sole arbitrator shall be appointed by the Chairman-cum-Managing Director of the Employer within 60 days from the day when a written and valid demand for arbitration is received by the Employer.

(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 J.A grade or two Railway Gazetted officers not below JA Grade and a retired Railway officer, retired not below the rank of SAG officer, as the arbitrators (Approved list of N.Rly).

For this purpose, the Employer will send a panel of more than 3 names of Gazetted Rly. Officers of one or more departments of the Rly. which may also include the

name(s) of retired Railway officer(s) empanelled to work as Railway Arbitrator (Approved list of N.Rly.) 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-cum-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-cum-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-cum-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 arbitrators it will be necessary to ensure that one of them is from the Accounts Department. An officer of selection grade rank of the Accounts Department of N.Rly (Approved list of N.Rly) shall be considered of equal status to the officers in SA grade of other departments of N.Rly. for the purpose of appointment of arbitrator.

(a) (iii) The minimum qualifications of Conciliator/ Arbitrator shall be graduate in the respective field. He will be a working officer with a minimum of 20 years service. He should be clear from the vigilance angle and should be a person with reputation of high technical/commercial ability and integrity. Also, he should not have associated with the contract to which the dispute pertains.

(a) (iv) If one or more of the arbitrators appointed as above refuses to act as arbitrator, withdraws from his office as arbitrator or vacates his/their office/offices or is/are unable or unwilling to perform his functions as

arbitrator for any reason whatsoever or dies or in the opinion of the Chairman cum Managing Director fails to act without undue delay, the Chairman cum Managing Director shall appoint new arbitrator/arbitrators to act in his/their place in the same manner in which the earlier arbitrator/arbitrators had been appointed. Such reconstituted Tribunal may, at its discretion, proceed with the reference from the stage at which it was left by the previous arbitrator(s).

(a) (v) The Arbitral Tribunal shall have power to call for such evidence by way of affidavits or otherwise, as the Arbitral Tribunal shall think proper, and it shall be the duty of the parties hereto to do or cause to be done all such things as may be necessary to enable the Arbitral Tribunal to make the award without any delay. The Arbitral Tribunal should record day-to-day proceedings. The proceedings shall normally be conducted on the basis of documents and written statements.

(a) (vi) While appointing arbitrator(s) under sub clause 62.4(a)(i), 62.4(a)(ii) and 62.4(a) (iv) above, due care shall be taken that he/they is/are not the one/those who had an opportunity to deal with the matters to which the contract relates or who in the course of his/their duties as IRCON employee expressed views on all or any of the matters under disputes or differences. The proceedings of the Arbitral Tribunal or the award made by such Tribunal will, however, not be invalid merely for the reason that one or more arbitrator had, in the course of his service, opportunity to deal with the matters to which the contract relates or who in the course of his/their duties expressed views on all or any of the matters under dispute.

(b) (i) The arbitral award shall state item-wise, the sum and reasons upon which it is based. The analysis and reasons shall be detailed enough so that the award could

be inferred there from.

(b) (ii) A party may apply for corrections of any computational errors, any typographical or clerical errors or any other error of similar nature occurring in the award of tribunal within 60 days of the receipt of the award.

(b) (iii) A party may apply to tribunal within 60 days of the receipt of award to make an additional award as to claims presented in the arbitral proceedings but omitted from the arbitral award.

6. Since the value of the claim exceeds Rs.2 crore, the Arbitration is to be conducted by an Arbitral Tribunal consisting of three Members.

7. Learned counsel for the petitioner submits that the Arbitration Clause, as framed, is invalid, *inter alia* on the ground that it stipulates that the Tribunal shall consist of a panel of three Officers, of whom two are to be serving Officer of the respondent and the third to be the retired Railway Officer of specified ranks.

8. Learned counsel submits that the said clause is in contravention of Section 12 of the Act, as amended by the Arbitration & Conciliation (Amendment) Act, 2015. Further, it is contended that the condition that stipulates that the respondent shall prepare a panel and the petitioner shall be required to choose from the panel is also invalid.

9. Reliance is placed on the decision in **M/s Voestalpine Schienen**

GMBH versus Delhi Metro Rail Corporation Limited, (2017)4 SCC 665.

10. Learned counsel further submits that the petitioner has impugned a similar clause with regard to other Contracts and without prejudice to his challenge to the validity and applicability of the said clause, he has instructions to state that out of the list forwarded by the respondent comprising of 14 officers, the petitioner has nominated Mr J.C.Shah, Former MD GSRDC, Ex.-Additional Secretary-RNB, as his nominee Arbitrator.

11. He submits that without prejudice to the rights and contentions of the petitioner and without admitting or conceding to the validity of the said clause, he has no objection, if an Arbitral Tribunal is constituted of three Arbitrators with Mr J.C.Shah being the petitioner's nominee Arbitrator.

12. Learned senior counsel for the respondent submits that the respondent has nominated Dr. Prem Singh Rana, CMD-HUDCO, as their nominee Arbitrator.

13. In view of the above, the Arbitral Tribunal is constituted comprising of Mr J.C.Shah, Former MD GSRDC, Ex.-Additional Secretary-RNB, as the petitioner's nominee Arbitrator and Dr. Prem Singh Rana, CMD-HUDCO, as the Respondent's nominee Arbitrator. The two nominee Arbitrators shall, in terms of the Clause 62.4(a)(ii), nominate a third Arbitrator, within a period of thirty days.

14. This 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.

15. The Arbitrators shall adjudicate the claims of the petitioner and the counter claims, if any of the respondents.

16. The Arbitrators shall fix their fee in consultation with the parties.

17. The parties are at liberty to approach the learned Arbitrators for elucidating the necessary disclosures and for further proceedings.

18. It is clarified that the constitution of the Arbitral Tribunal is without prejudice to the rights and contentions of the parties with regard to the validity or otherwise of the arbitration clause is concerned, in so far as other proceedings are concerned, where similar clause is in issue.

19. Learned senior counsel for the respondent submits that as of date, they have a list of only 14 Officers in their panel who can be nominated as Arbitrators.

20. The Supreme Court in **M/s Voestalpine Schienen GMBH** (*supra*), has held as under:-

"26. As already noted above, DMRC has now forwarded the list of all 31 persons on its panel thereby giving a very wide choice to the petitioner to nominate its arbitrator. They are not the employees or ex-employees or in any way related to DMRC. In any case, the persons

who are ultimately picked up as arbitrators will have to disclose their interest in terms of amended provisions of Section 12 of the Act. We, therefore, do not find it to be a fit case for exercising our jurisdiction to appoint and constitute the Arbitral Tribunal.

27. *Before we part with, we deem it necessary to make certain comments on the procedure contained in the arbitration agreement for constituting the Arbitral Tribunal. Even when there are a number of persons empanelled, discretion is with DMRC to pick five persons therefrom and forward their names to the other side which is to select one of these five persons as its nominee (though in this case, it is now done away with). Not only this, DMRC is also to nominate its arbitrator from the said list. Above all, the two arbitrators have also limited choice of picking upon the third arbitrator from the very same list i.e. from remaining three persons. This procedure has two adverse consequences. In the first place, the choice given to the opposite party is limited as it has to choose one out of the five names that are forwarded by the other side. There is no free choice to nominate a person out of the entire panel prepared by DMRC. Secondly, with the discretion given to DMRC to choose five persons, a room for suspicion is created in the mind of the other side that DMRC may have picked up its own favourites. Such a situation has to be countenanced. We are, therefore, of the opinion that sub-clauses (b) & (c) of Clause 9.2 of SCC need to be deleted and instead choice should be given to the parties to nominate any person from the entire panel of arbitrators. Likewise, the two arbitrators nominated by the parties should be given full freedom to choose the third arbitrator from the whole panel.*

28. *Some comments are also needed on Clause 9.2(a) of GCC/SCC, as per which DMRC prepares the panel of “serving or retired engineers of government departments*

or public sector undertakings". It is not understood as to why the panel has to be limited to the aforesaid category of persons. Keeping in view the spirit of the amended provision and in order to instil confidence in the mind of the other party, it is imperative that panel should be broad based. Apart from serving or retired engineers of government departments and public sector undertakings, engineers of prominence and high repute from private sector should also be included. Likewise panel should comprise of persons with legal background like Judges and lawyers of repute as it is not necessary that all disputes that arise, would be of technical nature. There can be disputes involving purely or substantially legal issues, that too, complicated in nature. Likewise, some disputes may have the dimension of accountancy, etc. Therefore, it would also be appropriate to include persons from this field as well.

29. Time has come to send positive signals to the international business community, in order to create healthy arbitration environment and conducive arbitration culture in this country. Further, as highlighted by the Law Commission also in its report, duty becomes more onerous in government contracts, where one of the parties to the dispute is the Government or public sector undertaking itself and the authority to appoint the arbitrator rests with it. In the instant case also, though choice is given by DMRC to the opposite party but it is limited to choose an arbitrator from the panel prepared by DMRC. It, therefore, becomes imperative to have a much broadbased panel, so that there is no misapprehension that principle of impartiality and independence would be discarded at any stage of the proceedings, specially at the stage of constitution of the Arbitral Tribunal. We, therefore, direct that DMRC shall prepare a broadbased panel on the aforesaid lines, within a period of two months from today."

(underlining supplied)

21. With reference to a similar clause, the Supreme Court in *M/s Voest Alpine Schienen GMBH* (*supra*) has directed that the panel has to be broadbased. The rationale given by the Supreme Court is that if a restricted panel is proposed, then the choice given to the opposite party is very limited, resulting in there being no free choice to nominate a person and it also gives room for suspicion in the mind of the other side. Such a situation has been countenanced by the Supreme Court. Accordingly, the Supreme Court directed that apart from serving or retired Engineers of Government Departments and Public Sector Undertakings, Engineers of prominence and high repute from private sector should also be included. It directed that a panel should comprise of persons with legal background like Judges and Lawyers of repute as it is not necessary that all disputes that arise, would be of technical nature. There could be disputes involving purely or substantially legal issues, that too, complicated in nature and some disputes may have the dimension of accountancy etc. It is, in these circumstances, that the Supreme Court directed the respondent in the said case to broadbase the panel and to be restricted not only to retired Engineers or Officers. Another reason given by the Supreme Court is that in case there is a broadbased panel, then there would be no misapprehension that impartiality or independence would be discarded at any stage of the proceedings. In those circumstances, the Supreme Court directed Delhi Metro Rail Corporation to prepare a broadbased panel on the principles, as laid down therein.

22. Similarly, in the present case, it would be expedient to direct

the respondent to broadbase their panel on the same lines as directed by the Supreme Court in *M/s Voestalpine Schienen GMBH* (*supra*) as expeditiously as possible preferably within a period of three weeks from today.

23. The direction to expedite the process of preparing a broadbased panel has been issued so that the two Arbitrators, who have been nominated, would have a broadbased panel to choose the third Arbitrator from.

24. The petition is accordingly disposed of.

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

SANJEEV SACHDEVA, J

AUGUST 21, 2017/“sn”