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

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Judgment delivered on: 25.09.2017

+ ARB.P. 576/2017

S.P. SINGLA CONSTRUCTIONS (P) LTD

..... Petitioner

versus

DELHI METRO RAIL CORPORATION LIMITED Respondent

Advocates who appeared in this case:

For the Petitioner : Mr. Anirudh Wadhwa with Mr. Vipul Kumar
and Ms. Sanjana Kala, Advocates.

Respondents : Mr. Chandra Prakash, Advocate with Mr. Puneet
Garg, Mr. Sanjay Kumar, Legal Officers,
DMRC.

CORAM:-

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

25.09.2017

SANJEEV SACHDEVA, J. (ORAL)

1. The petitioner, by the present petition under Section 11 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the Act) seeks appointment of an independent Arbitral Tribunal to adjudicate the claims of the petitioner.

2. The petitioner was awarded a contract by respondent for design and construction of a ramp in Phase-III of the Delhi Metro project pursuant to a Letter of Intent dated 26.07.2012.

3. As per the petitioner, the petitioner performed its obligations under the contract. However, on account of delay in the completion of the project, which is stated to be attributable to the respondent, losses were caused to the petitioner and even legitimate payments of the petitioner have been denied leading to the petitioner invoking arbitration.

4. The arbitration clause, as agreed to between the parties, reads as under:-

“17.9- Arbitration

If the efforts to resolve all or any of the disputes through conciliation fails, then such disputes or differences, whatsoever arising between the parties, arising out of touching or relating to construction/ manufacture, measuring operation or effect of the Contract or the breach thereof shall be referred to Arbitration in accordance with the following provisions:

(a) Matters to be arbitrated upon shall be referred to a sole Arbitrator if the total value of the claim is upto Rs. 5 million and to a panel of three arbitrators if total value of claims is more than Rs. 5 million. The Employer shall provide a panel of three arbitrators which may also include DMRC officers for the claims upto Rs. 5 million and a panel of five Arbitrators which may also include DMRC officers for claims of more than Rs. 5 million. The Contractor shall have to choose the sole Arbitrator from the panel of three and/or one Arbitrator from the panel of five in case three Arbitrators are to be appointed. The Employer shall also choose one Arbitrator from this panel of five and the two so chosen will choose the third arbitrator from the panel only. The Arbitrator(s) shall be

appointed within a period of 30 days from the date of receipt of written notice/ demand of appointment of Arbitrator from either party. Neither party shall be limited in the proceedings before such arbitrator(s) to the evidence or arguments put before the Engineer for the purpose of obtaining his decision. No decision given by the Engineer in accordance with the foregoing provisions shall disqualify him from being called as a witness and giving evidence before the arbitrator(s) on any matter, whatsoever, relevant to dispute or difference referred to arbitrator/s. The arbitration proceedings shall be held in Delhi only. The language of proceedings, that of documents and communication shall be English”

5. As per the petitioner, the claims of the petitioner are in excess of Rs. 5 million and, accordingly, a three member Arbitral Tribunal needs to be constituted in terms of Clause 17.9.
6. The petitioner by invocation letter dated 11.07.2017 informed the respondent that they had appointed their nominee arbitrator and requested the respondent to appoint its nominee arbitrator within 30 days of the receipt of the request.
7. As per the petitioner, the respondent failed to nominate their nominee arbitrator. It is contended that the respondent, by a letter dated 08.08.2017, shared with the petitioner a panel constituted of five proposed arbitrators, purportedly in terms of Clause 17.9 of the agreement between the parties and required the petitioner to choose one of the five panellists as their nominee arbitrators.

8. Being dissatisfied and being of the view that the said procedure, adopted by the respondent was not valid in view of the amendment to the Act by the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as the Amending Act, 2015), the petitioner approached this Court.

9. Learned counsel for the petitioner relies on the decision of the Supreme Court in **VOESTALPINE SCHIENEN GMBH VS. DELHI METRO RAIL CORPORATION LTD.:** (2017) 4 SCC 665 to contend that the respondent have to broad-base their panel and the requirement of choosing one of the five panellists has not found favour with the Supreme Court.

10. It is further contended that the arbitration clause is illegal and non-operative and would only survive for the purposes of reference of disputes to arbitration.

11. Learned counsel for the petitioner further contends that as far back as on 10.02.2017 by the said judgment in **VOESTALPINE SCHIENEN GMBH** (*supra*), the Supreme Court directed the respondent to broad-base their panel within a period of two months and as the respondent failed to broad-base their panel within the said period, they forfeited their right to suggest a panel of arbitrators.

12. It is further contended that in case a part of the clause is invalid, the entire clause is be declared invalid. Reliance is placed on the decision of the Supreme Court in **TRF LTD. VS. ENERGO**

ENGINEERING PROJECTS LTD : Civil Appeal No. 5306 of 2017 decided on 03.07.2017.

13. Learned counsel for the respondent submits that the respondent has broad-based their panel in terms of the directions of the Supreme Court in **VOESTALPINE SCHIENEN GMBH** (*supra*) and by a letter dated 13.09.2017, shared the panel comprising of 36 External Conciliators/Arbitrators in the Engineer category, 5 in the non-engineering category, 11 retired Judges and 10 Chartered Accountants and have requested the petitioner, by the said letter dated 13.09.2017 to nominate one of the panellists as their nominee arbitrators.

14. Learned counsel for the petitioner submits that in view of the judgments, as referred to by him, the right to suggest panel has been forfeited.

15. I am unable to accept the contentions of the learned counsel for the petitioner.

16. The Supreme Court in **VOESTALPINE SCHIENEN GMBH** (*supra*) has not held that the clause whereby the right is given to an employer to suggest a panel is invalid. The Supreme Court has directed the respondent therein, which is also the respondent in this petition, to broad-base their panel.

17. In terms of arbitration clause, as agreed to between the parties, the respondent was to suggest a panel of five proposed arbitrators, one

of whom was to be chosen by the petitioner as its nominee arbitrator. The panel was forwarded by the respondent on 08.08.2017 i.e. within 30 days of the request having been made by the letter dated 11.07.2017. Accordingly, the right of the respondent to suggest a panel and an obligation of the petitioner to choose one of the panellists would not be forfeited.

18. The Judgment in the case of *TRF LTD. (supra)*, is not applicable in the facts of the present case. In the said judgment, the Supreme Court was considering the issue as to whether the Managing Director who was to be the Sole Arbitrator was disqualified under section 12(5) of the Act (as amended by the Amending Act, 2015) and also as to whether he would, being disqualified, continue to possess the right to nominate an arbitrator in his place.

19. The Supreme Court held that the clause stipulating that the Managing Director would be the sole arbitrator fell afoul of Section 12 of the Act, as amended by the Amending Act, 2015 and, in those circumstances, held that if the Managing Director had himself become ineligible by operation of law, he would also forfeit the right to nominate an another arbitrator. The Supreme Court held that once the infrastructures collapses, the superstructure is bound to collapse. One cannot have a building without the plinth. The Supreme Court further explained by holding that once the identity of the Managing Director as the Sole Arbitrator is lost, the power to nominate someone else as an arbitrator is obliterated.

20. Clearly, that is not the issue at hand. The said judgment does not support the case of the petitioner.

21. The respondent, has now broad-based the panel and shared the enlarged list with the petitioner comprising of 36 External Conciliators/Arbitrators in the Engineer category, 5 in the non-engineer category, 11 retired Judges and 10 Chartered Accountants.

22. Accordingly, in view of the above, the petition is disposed of with a direction to the petitioner to nominate one of the Arbitrators from the broad based panel suggested by the respondent by the letter dated 13.09.2017 within a period of four weeks. Thereafter, the respondent shall nominate their nominee arbitrator from the same panel within a period of four weeks and the said two arbitrators shall chose the third arbitrator from the same panel who shall be the presiding arbitrator.

23. The petition is, accordingly, disposed of in the above terms. There shall be no order as to cost.

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

SANJEEV SACHDEVA, J

SEPTEMBER 25, 2017
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