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

+ **ARB.P. 248/2018**

AFCONS INFRASTRUCTURE LIMITED Petitioner

Through: Mr Rajiv Nayar, Sr. Advocate, Mr
Darpan Wadhwa, Sr. Advocate with
Mr Pallav Pandey, Mr Sharad Sharma
and Mr R. Parashar, Advocates.

versus

DELHI METRO RAIL CORPORATION LTD. Respondent

Through: Mr Shiv Kumar, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

% **09.04.2018**

IA No.4579/2018

1. Allowed, subject to all just exceptions.

ARB.P. 248/2018

2. The petitioner has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying that an arbitrator be appointed to adjudicate the disputes arising out of an agreement dated 28.06.2012 entered into between the parties (hereafter 'the Agreement'). The Agreement includes an Arbitration clause, which is set out below:-

“17.9 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 with 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 obtained 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.

- (b) The Employer at the time of offering the panel of Arbitrator(s) to be appointed as arbitrator shall also supply the information with regard to the qualifications of the said Arbitrator nominated in the panel along with their professional experience, phone nos. and addresses to the contractor.
- (c) The award of the sole Arbitrator or the award by majority of three Arbitrators as the case may be binding on all parties.”

3. As is apparent from the above, in terms of the arbitration clause, an Arbitral Tribunal comprising of three arbitrators is required to be constituted. The arbitration clause further requires the respondent to furnish a panel of five persons and the petitioner is required to nominate one of them to be an arbitrator.

4. There is some controversy with regard to the furnishing of the panel of five names. The respondent submits that the same was provided to the petitioner prior to the filing of the petition. The petitioner disputes the same and claims that the said panel was provided after the petitioner had filed the present petition and, therefore, the respondent has forfeited its right to appoint an arbitrator.

5. After some arguments, the learned counsel appearing for the parties agree that the respondent shall provide a fresh panel of five former Judges of the Supreme Court of India and/or of High Court. The petitioner would nominate one of them as an arbitrator. The respondent shall also nominate an arbitrator from the said panel. Both the arbitrators so nominated shall jointly concur on appointment of the third arbitrator.

6. The said panel of five proposed arbitrators would be provided to the petitioner within a period of two working days from today.

7. In view of the consensus between the parties, no further orders are required to be passed in this petition. The same is disposed of.

VIBHU BAKHRU, J

APRIL 09, 2018/MK