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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 10th May, 2018

+ OMP(T) (COMM) 38/2017
LARSEN & TOUBRO LIMITED Petitioner
Through: Mr.Manu Seshadri & Mr.Ishan Bisht,
Advts.

versus

RAIL VIKAS NIGAM LIMITED Respondent
Through: Mr.Udit Seth, Adv.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 14 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner seeking termination of the mandate of the Arbitral Tribunal constituted by the respondent to adjudicate the disputes that have arisen between the parties in relation to Package ANV4 - "Construction of Viaduct including related works for 5.40 km length excluding station areas from Ch. 20006.60 to Ch. 26394.60 between CBD-1 to Rabindra Tirthain Newgaria-Airport Corridor of Kolkata Metro Railway Line" dated 15.12.2011. The arbitration agreement between the parties is contained in Clause 17.3 of the agreement, which is reproduced herein below:-

"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 not 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 binding upon both parties. The expenses of the conciliators/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."

2. As certain disputes had arisen between the parties (for the sake of convenience referred to as Series 1 claim), the same were referred for adjudication to an Arbitral Tribunal consisting of three serving employees of the respondent. While the said adjudication was pending, the petitioner vide

its letter dated 21.03.2016 sought reference of further disputes to arbitration (for the sake of convenience referred to as Series 2 claims). This letter has importance as the parties are at dispute with respect to the effect of this letter as far as application of Section 12(5) of the Act is concerned, and therefore this letter is reproduced hereinbelow:-

“This is with reference to above mentioned letters wherein we have requested you to refer the following claims to Arbitration Tribunal in addition to the claims for which hearing is in progress.

xxxxxx

As no response has been received till date (since we are in huge financial crunch) we request you again to revisit the said claims and compensate the costs incurred by us at the earliest. Otherwise please refer the same to the Arbitration Tribunal for further course of action as per provisions of Contract Agreement.”

3. The respondent vide its letter dated 19.05.2016 referred the Series 2 claims to the same Arbitral Tribunal which, as noted above, consisted of only the serving employees of the respondent company.
4. The petitioner, by its letter dated 07.11.2016, while seeking reference of certain additional claims which had arisen (for the sake of convenience referred to as Series 3 claims) sought reference of claims under Series 2 and 3 to an independent Arbitral Tribunal. This request of the petitioner was rejected by the respondent by its letter dated 16.11.2016 and the respondent agreed to the reference of only Series 3 claims to another independent Arbitral Tribunal, while claiming that as far as Series 2 claims are concerned, the same already stand referred to the earlier Arbitral Tribunal and therefore, cannot be referred to another Arbitral Tribunal.
5. It is not disputed by the respondent that the Arbitral Tribunal to whom Series 2 claims are referred would be ineligible under Section 12(5) of the

Act. Section 12(5) of the Act is reproduced hereinunder:-

“12(5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator: Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.”

6. The respondent seeks to rely upon the proviso to Section 12(5) and contend that the letter dated 21.03.2016 is an express agreement in writing to waive the applicability of Section 12(5) of the Act. In my opinion, the letter dated 21.03.2016 cannot be read as an express agreement to waive the applicability of Section 12(5) of the Act. A reading of the said letter would show that the petitioner had sought reference of Series 2 claims to an Arbitral Tribunal. The express agreement as mentioned in the proviso to Section 12(5) can arise only where the party is aware of its rights and thereafter, has consciously taken decision to waive the right for opposing such appointment under the main provision. From the letter dated 21.03.2016, I cannot infer any such express agreement by the petitioner.

7. Counsel for the respondent places reliance on the judgment of this Court in ***Bharat Broadband Network Limited v. United Telecoms Limited***, 2017 SCC OnLine Del 11905, to submit that in a similar case, this Court relying upon the proviso to sub-section 5 to Section 12 had refused to terminate the mandate of the Arbitral Tribunal. In my opinion, the said judgment is of no assistance to the respondent. In that case, the petitioner itself had appointed an Arbitral Tribunal after coming into force of the Section 12(5) of the Act. Therefore, there was an express waiver as contemplated under the proviso to Section 12(5) of the Act. As observed by

me earlier, the letter dated 21.03.2016 of the petitioner cannot be read as an express waiver as contemplated in the proviso to Section 12 (5) of the Act.

8. Another important factor that would influence the decision in the present case is that though the Series 2 claims were referred to the Arbitral Tribunal by the respondent vide its letter dated 19.05.2016, the Arbitral Tribunal held its first meeting only on 05.01.2017, where it called upon the petitioner to file its Statement of Claim. There is no explanation for this delay of almost 8 months on behalf of the Arbitral Tribunal. Section 29A of the Act has been introduced in order to instill a sense of urgency in the Arbitral Tribunal and achieve the object of expeditious disposal of arbitration proceedings. Certainly, the unexplained silence of more than 8 months defeats the very object of such an amendment.

9. In view of the above, the mandate of the Arbitral Tribunal constituted by the respondent vide its letter dated 19.05.2016 is hereby terminated. Counsel for the petitioner submits that the petitioner has nominated **Justice Mukul Mudgal** (Retired) Chief Justice of Punjab and Haryana High Court (R/o A-1, 2nd Floor, Nizamuddin East, New Delhi-110013, Mobile: 9818000250) as its nominee Arbitrator.

10. The respondent shall nominate its nominee Arbitrator within 30 days from today. While nominating such Arbitrator, the respondent would also keep in mind that this Court by a separate order passed today in Arbitration Petition no.335/2017 for Series 3 claims, has nominated an Arbitrator on its behalf, who is a person from the panel of Arbitrators framed by the respondent itself. It may be advisable if the present set of Series 2 claims are also referred to the same Arbitral Tribunal.

11. The present petition is disposed of with the above directions with no order as to costs.

NAVIN CHAWLA, J

MAY 10, 2018/rv