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

+ **O.M.P.(I) (COMM.) 421/2018**

GMR POCHANPALLI EXPRESSWAYS LIMITED Petitioner

Through Mr.Sajan Poovayya, Sr. Adv. with
Mr.Rishi Agarwala, Ms.Shuriti Arora,
Ms.Priyanka M.P. and Mr.P.S.Kosla,
Advs.

versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA Respondent

Through Mr.Ankur Mittal, Adv.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

ORDER

% **02.11.2018**

I.A. No.15242/2018 (Exemption)

Allowed, subject to all just exceptions.

O.M.P.(I) (COMM.) 421/2018

Issue notice. Notice is accepted by Mr.Ankur Mittal, Advocate on behalf of the respondent.

It is the contention of the petitioner that the only dispute between the parties is whether in the terms of Clause 4.3 of Schedule L to the Concession Agreement dated 31.03.2006 executed between the parties, the petitioner is under an obligation to relay the surface and bituminous concrete only because the five years period has expired through the surface roughness is of the prescribed measure.

Learned senior counsel for the petitioner submits that upon this

dispute having arisen between the parties, the petitioner had invoked the Arbitration Agreement by its letter dated 07.12.2017, appointed its nominee Arbitrator and requested the Indian Council of Arbitration (ICA) to appoint the Arbitral Tribunal in accordance with its Rules. The respondent has also nominated its Arbitrator on 01.06.2018, however, the Arbitral Tribunal could not be constituted as the respondent refused to pay its share of fee.

On being asked by the ICA, the petitioner has paid the respondent's share of fee on 30.10.2018 and therefore, there is no impediment in the constitution of the Arbitral Tribunal. He further submits that as the next period of five years was also approaching and the respondent was insisting on relaying of the surface, the petitioner has also filed an application under Section 17 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') seeking interim relief from the Arbitral Tribunal. The said application could not be considered for want of constitution of the Arbitral Tribunal.

Counsel for the respondent, who appears on an advance notice, submits that in accordance with Clause 2.6.1 read with Clause 4.3.1 of the Concession Agreement, the petitioner is to relay the surface irrespective of the measure of its roughness. He further submits that no prejudice would be caused to the petitioner if it replies to the respondent's notice dated 22.10.2018 issued to the petitioner. He further submits that the respondent has refused to pay the fee as demanded by the ICA for a justified reason.

I have considered the submissions made by the counsels for the parties. With the payment of the fee on behalf of the respondent by the petitioner, the only impediment in constitution of the Arbitral Tribunal no longer survives. The petitioner has also filed an application under Section

17 of the Act before the ICA on 03.05.2018. The respondent has also filed its response.

In view of the above, the present petition is disposed of with the following directions:

- a. ICA shall immediately and within a period of one week from today constitute the Arbitral Tribunal for adjudicating the disputes that have arisen between the parties;
- b. The Arbitral Tribunal shall consider the application filed by the petitioner under Section 17 of the Act and the first hearing in this regard shall be held by the Arbitral Tribunal preferably and not later than two weeks from its constitution;
- c. The petitioner shall, without prejudice to its rights and contentions, respond to the notice dated 22.10.2018 issued by the respondent;
- d. The respondent shall, however, not implement the final decision taken by it on such response without taking leave of the Arbitral Tribunal so constituted.

Copy of the order be given *dasti* under the signature of the Court Master.

NAVIN CHAWLA, J

NOVEMBER 02, 2018/Arya