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

+ **ARB.P. 288/2020 & I.A. 11239/2020**

**M/S MGCPL-AETPL (JV)**

..... Petitioner

Through: Mr. Naresh Markanda, Sr. Adv.  
with Mr. Virender Kumar Sharma, Adv.

versus

**THE NATIONAL HIGHWAYS AUTHORITY OF INDIA  
(NHAI), THROUGH, THE CHAIRMAN, NATIONAL  
HIGHWAYS AUTHORITY OF INDIA & ORS.**

..... Respondents

Through: Ms. Padma Priya and Ms.  
Akansha Das, Advs. for R-1 to R-3

**CORAM:**

**HON'BLE MR. JUSTICE C. HARI SHANKAR**

**J U D G M E N T (O R A L)**

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**10.03.2021**

(Video-Conferencing)

1. By this petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("the 1996 Act"), the petitioner seeks reference of the dispute between the petitioner and Respondent Nos. 1 to 3 to arbitration and the appointment of an arbitrator, by this Court, for the said purpose.

2. The facts in brief.

3. *Vide* Engineering Procurement Construction (EPC) agreement dated 2<sup>nd</sup> November, 2015, the work of "Four laning of Kharar-Kurali Section of NH-21 from Km 15.765 to Km 29.900" in Punjab, was

awarded to the petitioner by NHAI (Respondent Nos. 1 to 3 herein). The petitioner also furnished a Performance Bank Guarantee for ₹ 10,61,20,000/- being 5 % of the contract value.

4. The petitioner alleges that the NHAI defaulted in complying with Clause 4.1.3(a) of the EPC agreement, resulting in delay, on the part of the petitioner, in completing the work contracted and resultant loss to the petitioner. It is also alleged that some of the petitioner's bills, for the work executed by it, are still outstanding.

5. Clauses 26.1 to 26.3 of the EPC agreement provide for resolution of disputes and read as under:

**“26.1 Dispute Resolution**

26.1.1 Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the "**Dispute**") shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 26.2.

26.1.2 The Parties agree to use their best efforts for resolving all Disputes arising under or in respect of this Agreement promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any Dispute.

**26.2 Conciliation**

In the event of any Dispute Between the Parties, either Party may call upon the Authority's Engineer, or such other person as the Parties may mutually agree upon (the "**Conciliator**") to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Conciliator or

without the intervention of the Conciliator, either Party may require such Dispute to be referred to the Chairman of the Authority and the Chairman of the Board of Directors of the Contractor for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) business days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the 7 (seven) business day period or the Dispute is not amicably settled within 15 (fifteen) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30 (thirty) days of the notice in writing referred to in clause 26.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 26.3."

### **26.3 Arbitration**

26.3.1 Any Dispute which is not resolved amicably by conciliation, as provided in clause 26.1 & 26.2, shall be finally settled by arbitration as set forth below:

(i) The Dispute shall be finally settled by arbitration in accordance with the Arbitration and Conciliation Act, 1996, or any statutory amendment thereof. The Arbitral tribunal shall consist of 3 Arbitrators, one each to be appointed by NHAI and the Contractor. 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 a consensus within a period of 30 days from the appointment of the Arbitrator appointed subsequently, the Presiding Arbitrator shall be appointed by the Chairman of the Executive Committee of the Indian Roads Congress.

(i) Neither party shall be limited in the proceedings before such Tribunal to the evidence or arguments before the other party/ Independent consultant.

(ii) Arbitration may be commenced during or after the Contract Period, provided that the obligations of NHAI and the Contractor shall not be altered by reason

of the arbitration being conducted during the Contract Period.

(iii) If one of the parties fails to appoint its Arbitrator in pursuance of Sub-Clause (i) above, within 30 days after receipt of the notice of the appointment of its Arbitrator by the other party, then the Chairman of the Executive Committee of the Indian Roads Congress, shall appoint the Arbitrator. A certified Copy of the order of the Chairman of the Executive Committee of the Indian Roads Congress making such an appointment shall be furnished to each of the parties.

(iv) Arbitration proceedings shall be held at Delhi, India, and the language of the Arbitration Proceedings and that of all documents and communications between the parties shall be English.”

6. In accordance with the protocol envisaged in the afore-extracted clauses of the EPC agreement, the petitioner wrote to the Engineer/Conciliator (Respondent No. 4 herein), on 26<sup>th</sup> September, 2019, to mediate and settle the dispute.

7. Mediation proceedings, however, failed to result in any resolution of the controversy, as was confirmed by Respondent No. 4 *vide* letter dated 14<sup>th</sup> October, 2019.

8. In the circumstances, the petitioner invoked Clause 26.3 of the EPC agreement, providing for arbitration, *vide* letter dated 2<sup>nd</sup> November, 2019, addressed to NHAI, and also named its nominee arbitrator in the said communication.

9. NHAI was, therefore, requested to appoint its nominee

arbitrator within a period of 30 days.

10. No response having been received from NHAI within the aforesaid period of 30 days, the petitioner, in accordance with Clause 26.3.1(iii) of the EPC Agreement, wrote to the Indian Road Congress (IRC) – Respondent No. 5 herein – on 6<sup>th</sup> December, 2019, requesting the IRC to appoint a nominee arbitrator for the respondent.

11. While the request of the petitioner to IRC was so pending, the NHAI, *vide* letter dated 27<sup>th</sup> February, 2020, appointed a learned retired Judge of the High Court of Allahabad as its nominee arbitrator.

12. On coming to know of this fact, the petitioner wrote to said nominee arbitrator of NHAI on 12<sup>th</sup> March, 2020, contesting the legitimacy of his appointment, as, on the expiry of 30 days from the receipt of the notice invoking arbitration issued by the petitioner, the NHAI had lost its right to appoint its nominee arbitrator.

13. On 17<sup>th</sup> April, 2020, the IRC wrote to the petitioner, forwarding a copy of a letter, dated 17<sup>th</sup> March, 2020, received by the IRC from NHAI, informing the IRC that NHAI had appointed its nominee arbitrator on 27<sup>th</sup> February, 2020.

14. The petitioner, thereupon, wrote to NHAI on 5<sup>th</sup> May, 2020, stating that the appointment of the nominee arbitrator by the NHAI was void *ab initio*, as the NHAI had lost its right to appoint its arbitrator on the expiry of 30 days from the receipt of notice invoking

arbitration by the petitioner.

**15.** It is in these circumstances that the petitioner has approached this Court, seeking the intervention of the court to appoint a nominee arbitrator on behalf of NHAI, so that the arbitrator appointed by the petitioner and the nominee arbitrator of NHAI appointed by this court could proceed to appoint the third, presiding arbitrator, and the arbitral proceedings could take off.

**16.** Mr. Naresh Markanda, learned Senior Counsel for the petitioner, submits that this issue stands covered, in the petitioner's favour, by a judgment dated 6<sup>th</sup> November, 2020 passed by this Court in Arb. P. 208/2020 (*M/s Larsen & Toubro Ltd. v. N.H.A.I.*).

**17.** Ms. Padma Priya, with commendable fairness, agrees to this position of law.

**18.** In view thereof, this Court proceeds to appoint Hon'ble Mr. Justice S. P. Garg (Mob. No.9910384627 and E-mail ID : spgargdhc@gmail.com), a learned retired Judge of this Court, as the nominee arbitrator on behalf of NHAI.

**19.** The NHAI may contact the nominee arbitrator within 48 hours of receipt of a certified copy of this order.

**20.** The nominee arbitrator of the petitioner and the nominee arbitrator of the NHAI, appointed by this Court, thereafter may

proceed to appoint a presiding arbitrator in accordance with the provision of the EPC agreement between the parties.

**21.** The petition stands disposed of in the aforesaid terms, with no order as to costs.

**C. HARI SHANKAR, J.**

**MARCH 10, 2021**

*dsm*

