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

+ **ARB.P. 387/2024**

**M/S AUSHTA CONSULTING ENGINEERS PVT. LTD. IN JV
WITH DN CONSULTANT** Petitioner

Through: Mr. Abhishek Birthray with Mr.
Chandan Sharma and Mr. Kshitij
Laad, Advocates *via* video-
conferencing.

versus

**NATIONAL HIGHWAYS AND INFRASTRUCTURE
DEVELOPMENT CORPORATION LTD** Respondent

Through: Mr. Santosh Paul, Senior Advocate
with Mr. Bikash Mohanty, Mr.
Apratim Animesh Thakur, Mr.
Shashwat Prateek Pande and Mr.
Aimen Zamir, Advocates.
Mr. Anshul Aggarwal, Legal
Professional and Mr. Abhishek Rana,
Manager.

**CORAM:
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI**

**ORDER
17.05.2024**

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By way of the present petition under section 11(6) read with
section 11(13) of the Arbitration & Conciliation Act 1996 ('A&C
Act'), the petitioner seeks appointment of a Sole Arbitrator to



- adjudicate upon the disputes that are stated to have arisen with the respondent from Contract Agreement dated 16.12.2020 ('Agreement').
2. Notice on this petition was issued on 19.03.2024; consequent upon which reply dated 09.04.2024 has been filed by the respondent.
 3. Mr. Abhishek Birthray, learned counsel for the petitioner has drawn the attention of this court to clause 8.4 of the General Conditions of Contract ('GCCs') governing the Agreement which comprises the arbitration agreement; and contemplates reference of disputes between the parties to arbitration in accordance with the A&C Act; with the 'venue' of arbitration being at Delhi.
 4. As per the record, the petitioner invoked arbitration *vide* Notice dated 02.11.2023, to which the respondent did not send any reply.
 5. Mr. Birthray submits that the appointment procedure agreed to between the parties in clause 8.4.2 of the GCCs has failed; consequent whereupon, the petitioner was constrained to file the present petition under section 11 of the A&C Act seeking appointment of Sole Arbitrator by the court.
 6. To support this submission, Mr. Birthray draws attention to clause 8.4.2 of the GCCs which reads as under :

"8.4.2. Each dispute submitted by a Party to arbitration shall be heard by a sole arbitrator to be appointed as per the procedure below

(a) Parties may agree to appoint a sole arbitrator or, failing agreement on the identity of such sole arbitrator within thirty(30) days after receipt by the other Party of the proposal of a name for such an appointment by the Party who initiated the proceedings, either Party may apply to the President, Indian Roads Congress, New Delhi for a list of not fewer than five nominees and, on receipt of such list, the Parties shall alternately strike names



there from, and the last remaining nominee on the list shall be sole arbitrator for the matter in dispute. If the last remaining nominee has not been determined in this manner within sixty (60) days of the date of the list, the president, Indian Roads Congress, New Delhi, shall appoint, upon the request of either Party and from such list or otherwise, a sole arbitrator for the matter in dispute.”

7. In this behalf, Mr. Birthray submits that the petitioner addressed to the arbitral institution agreed to by the parties, namely to the Indian Roads Congress ('IRC'), a letter dated 14.12.2023, requesting them to nominate a panel of arbitrators in accordance with clause 8.4.2 of the GCCs, in order to proceed with the appointment of an arbitrator.
8. It is pointed-out however, that the IRC only wrote to the respondent on 01.02.2024; and in that communication, instead of furnishing a list of five nominees in compliance with clause 8.4.2 of the GCCs, the IRC requested the respondent to furnish its observations/views in the matter.
9. Thereupon, *vide* letter dated 01.04.2024, the respondent replied to IRC's letter dated 01.02.2024, setting-out the chronological sequence of proceedings under sections 9 and 11 of the A&C Act instituted by the petitioner; and then proceeded to request IRC to furnish a list of 05 nominees in terms of clause 8.4.2 of the GCCs.
10. Mr. Birthray points-out, that only thereafter, *vide* letter dated 01.04.2024, IRC nominated 05 persons empanelled with them as proposed arbitrators in the matter. In the process however, it is argued, the arbitral institution appointed *i.e.* IRC, acted in violation of section 11(13) of the A&C Act, which mandates that an application made to an arbitral institution for appointment of an arbitrator *shall be disposed-of within a period of 30 days* from the date of service of notice on the



opposite party, namely, in this case, within 30 days from the date on which the respondent received communication as regards the petitioner's request for appointment of an arbitrator *i.e.* from 01.02.2024.

11. Mr. Birthray argues, however that the petitioner waited for some more time, and thereafter filed the present petition on 12.03.2024.
12. In the circumstances, counsel argues, that the procedure for appointment of an arbitrator as stipulated under clause 8.4.2 of the GCCs has failed; and the court should therefore appoint an arbitrator.
13. Mr. Santosh Paul, learned senior counsel appearing for the respondent disputes the submissions made on behalf of the petitioner, to argue that since *vide* letter dated 01.04.2024, IRC has nominated 05 persons, the parties must follow the procedure of striking-out the names appearing on that list by circulation, till such time that the name of an arbitrator is zeroed-on, to adjudicate their disputes.
14. Upon a conspectus of the matter, and after considering the submissions made at Bar, this court is persuaded to accept the submissions made on behalf of the petitioner, namely that the procedure provided under clause 8.4.2 of the GCCs has failed, inasmuch as the appointed arbitral institution has failed to nominate 05 persons even within 30 days of receipt of communication dated 01.02.2024 sent by the IRC to the respondent.
15. For clarity, section 11(13) of the A&C Act provides that an arbitral institution is required to dispose-of an application received by it for appointing an arbitrator within a period of 30 days from the date that such communication/notice is served on the opposing party. Since in



the present case, the arbitral institution has not followed the procedure agreed upon between the parties in clause 8.4.2 of the GCCs, the action of the IRC would have been acceptable had they appointed the arbitrator within 30 days of receipt of their communication dated 01.02.2024 by the respondent. Even this, the IRC did not do.

16. This court is of the view that the procedure did not contemplate that the IRC would ask for the observation or views of the respondent; and its inactions up until 01.02.2024, and thereafter until 01.04.2024, were contrary to the provisions of section 11(13) of the A&C Act.
17. Apart therefrom, it is noticed that the respondent does not dispute the existence of the arbitration provisions, nor does it dispute the existence of disputes between the parties.
18. Upon a conspectus of the averments contained in the petition, the objections taken by the respondent, and the submissions made, this court is satisfied that there is a valid and subsisting arbitration agreement between the parties; that this court has territorial jurisdiction to entertain and decide the present petition; and also that the disputes that are stated to have arisen between the parties, as set-out *inter-alia* in invocation notice dated 02.11.2023, do not appear *ex-facie* to be non-arbitrable.
19. Accordingly, the present petition is allowed and **Mr. Narottam Kaushal, former District Judge, Delhi (Cellphone No.: +91 9910384683)** is appointed as the learned Sole Arbitrator to adjudicate upon the disputes between the parties.
20. The learned Sole Arbitrator would furnish to the parties requisite disclosures as required under section 12 of the A&C Act; and in the



event there is any impediment to the appointment on that count, the parties are given liberty to file an appropriate application in this court.

21. The learned Arbitrator shall be bound by the schedule of fee and expenses as set-out in the contract.
22. Parties shall share the arbitrator's fee and arbitral costs, equally.
23. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Arbitrator on their merits, in accordance with law.
24. Parties are directed to approach the learned Arbitrator appointed within 04 weeks.
25. A copy of this order be communicated by the Registry *via* e-mail to the learned Sole Arbitrator, as also to learned counsel for the parties.
26. The petition stands disposed-of in the above terms.
27. Other pending applications, if any, also stand disposed-of.

ANUP JAIRAM BHAMBHANI, J

MAY 17, 2024

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