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

+ **ARB.P. 517/2023**

S. P. SINGLA CONSTRUCTIONS PVT. LTD. Petitioner

Through: **Mr. Anirudh Wadhwa and Mr.
Shashwat Awasthi, Advocates.**

Versus

NATIONAL HIGHWAYS AUTHORITY OF INDIA..... Respondent

Through: **Mr. Santosh Kumar SC with Mr.
Kushagra Aman, Advocates**

**CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH**

**ORDER
28.02.2024**

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1. This is a petition under Section 11 of the Arbitration and Conciliation Act, 1996 seeking appointment of an Arbitral Tribunal.
2. The petitioner was awarded EPC contract dated 09.12.2014 for construction of 3-lane new Road under Bridge (RUB) at Ch 9+513 of NH-1A (now known as NH-44) with Box push technique and its approaches & allied works from Ch. 9+200 to 9+770(LHS) near Sujanpur (Pathankot), Punjab.
3. The Dispute Resolution Clause is contained at Article 26 of the EPC Contract, providing for resolution, in the first instance, through Conciliation



(Article 26.2) failing which, through Arbitration (Article 26.3).

4. The relevant portion of the arbitration clause reads as under:

“26.3 Arbitration

26.3.1 Any Dispute which is not resolved amicably by conciliation, as provided in Clause 26.2, shall be finally decided by reference to arbitration by a Board of Arbitrators appointed in accordance with Clause 26.3.2. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the "Rules"), or such other rules as may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration Act. The venue of such arbitration shall be Delhi, and the language of arbitration proceedings shall be English.

26.3.2 There shall be a Board of three arbitrators, of whom each Party shall select one, and the third arbitrator shall be appointed by the two arbitrators so selected and in the event of disagreement between the two arbitrators, the appointment shall be made in accordance with the Rules.

.....”

5. It is stated that due to the failure of the respondent to amicably settle the claims of the petitioner by way of conciliation in terms of Article 26.2 of the EPC contract, the petitioner *vide* notice dated 09.02.2023 invoked the arbitration clause and appointed one Mr. I.J. Mamtani as its nominee



arbitrator. The petitioner also requested the respondent to appoint its nominee arbitrator within 30 days from the receipt of the letter.

6. The respondent did not appoint any arbitrator and consequently, the present petition was filed on 07.05.2023. After service of notice, the respondent appointed its nominee arbitrator on 17.07.2023, namely Mr. Rajiv Yadav.

7. It is pertinent to mention that the reply dated 17.07.2023, except for appointing the nominee arbitrator, did not allege that the invocation by the petitioner was not in order or wrong.

8. Mr. Kumar, learned counsel for the respondent draws my attention to the reply to state that the invocation by the petitioner was contrary to the arbitration clause as it did not adhere to the pre-arbitration procedure in terms of the arbitration rules.

9. I have heard learned counsel for the parties.

10. Admittedly, the petitioner *vide* notice dated 09.02.2023 invoked the arbitration clause and nominated its nominee arbitrator and requested the respondent to appoint an arbitrator.

11. The respondent did not appoint any arbitrator for 30 days as requested, and only after filing of the petition and service of the notice did it appoint its nominee arbitrator. Hence, a perusal of the reply dated 17.07.2023 clearly shows that the respondent agreed to the invocation notice and appointed an arbitrator.

12. The reliance of the petitioner on the judgment of ***Punj Lloyd Ltd. v. Petronet MHB Ltd.***, (2006) 2 SCC 638 is well placed, and more particularly paragraph 5 which reads as under:

“5. Having heard the learned counsel for the parties, we are satisfied



that the appeal deserves to be allowed. The learned counsel for the appellant has placed reliance on the law laid down by this Court in the case of Datar Switchgears Ltd. v. Tata Finance Ltd. [(2000) 8 SCC 151] (SCC p. 158, para 19) wherein this Court has held as under:

“[S]o far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the court under Section 11, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases.”

13. Hence, the respondent has forfeited its right to appoint an arbitrator.
14. The argument of the learned counsel for the respondent that the invocation itself is bad is also without merit as the reply dated 17.07.2023 did not make any such averment and in fact acted on the arbitration clause and the respondent nominated Mr. Rajiv Yadav as its nominee arbitrator. The reply is reproduced as under:-



सत्यमेव जयते

DOCUMENTS R-2

भारतीय राष्ट्रीय राजमार्ग प्राधिकरण

(सड़क परिवहन और राजमार्ग मंत्रालय, भारत सरकार)

National Highways Authority of India

(Ministry of Road Transport and Highways, Government of India)

प्लॉट-5 एवं 8, सेक्टर-10, द्वारका, नई दिल्ली - 110 075 • G-5 & 6, Sector-10, Dwarka, New Delhi-110075

दूरभाष/Phone : 91-11-25074100 / 25074200

NHAI/PIU/JAL/2023/RUB/JAL/PTK(Comp. No. 193257) 466

Date: 17.07.2023



To,
Shri Rajiv Yadav, Retd. IAS
Bungalow No. 24,
New Moti Bagh,
New Delhi-110023
E-mail: yadav.rajiv21@gmail.com
Phone: 9811376733

Sub.: Appointment as Arbitrator on behalf of NHAI in the matter of Arbitration between M/s S.P.Singla Constructions Pvt Ltd. and NHAI.

Ref: Construction of 3-Lane new RUB at Ch. 9+513 of NH-1A (Now Known as NH-44) with Box Push Technique and its Approaches & Allied works from Ch. 9+200 to 9+770 (LHS) near Sujankur (Pathankot) in the State of Punjab on Engineering, procurement and construction (EPC) mode.

Sir,

It is to inform that the Competent Authority, National Highways Authority of India (NHAI) is pleased to nominate your good self as esteemed Arbitrator for the subject project to adjudicate upon the disputes referred by the Contractor vide letter no. SP5/P-283/124 dated 09.02.2023 (copy enclosed).

2. The relevant clause 26.3.1 of Contract Agreement states that "Any Dispute which is not resolved amicably by conciliation, as provided in Clause 26.2, shall be finally decided by reference to arbitration by a Board of Arbitrators appointed in accordance with Clause 26.3.2. Such arbitration shall be held in accordance with the Rules of Arbitration of the International Centre for Alternative Dispute Resolution, New Delhi (the "Rules"), or such other rules as may be mutually agreed by the Parties, and shall be subject to the provisions of the Arbitration Act. The venue of such arbitration shall be Delhi, and the language of arbitration proceedings shall be English." Further, Clause 26.3.2 states that "There shall be a Board of three arbitrators, of whom each Party shall select one, and the third arbitrator shall be appointed by the two arbitrators so selected, and in the event of disagreement between the two arbitrators, the appointment shall be made in accordance with the Rules".

3. It is submitted that the Contractor has nominated Sh. I.J.Mamtani, Chief Engineer (Retd) MoRTH as Arbitrator. It is requested that after acceptance of this offer you along with co-arbitrator Sh. I.J.Mamtani, Chief Engineer (Retd) MoRTH may finalize the Presiding Arbitrator, who is willing to accept the fee Schedule in terms of agreement. After finalization of the name of Presiding Arbitrator with mutual consent, the profile of Presiding Arbitrator be forwarded for our records along with his/her disclosures as per the provisions of Schedule V & VII of the Amended Act, 2015 and the consent to complete the entire Arbitration within a period as per the Arbitration Act, as amended time to time.

4. The conditions in Schedule-V & VII [see Section 12(1) (b) and 12 (5)] of the Arbitration & Conciliation Act, 1996 as amended by the Amendment Act, 2015 (3 of 2016) with respect to maintaining impartiality in the arbitration process shall be kept sacrosanct and in pursuance thereof your interests (past as well as present) in the matter, be disclosed to all concerned by making a declaration in the format as prescribe in Schedule VI of the Arbitration & Conciliation Act, 2015 (as amended).

Cont. on page-2.....



5. All Arbitration proceedings are addressed to officer, defending the case on behalf of NHAI (at sr. no. (iii) Below) and Legal Division of NHAI.
6. You are most respectfully requested to confirm your consent to the above by return email.
7. This is without prejudice to all rights and contention of NHAI.

Yours faithfully,

(Pawan Kumar)
Chief General Manager (Legal)
Mob. No. 9999918147
Email-pawankumar@nhai.org

Copy to:

- (i) Mr. Mamtani, Chief Engineer (Retd), G-58 Lajpat Nagar-3 New Delhi 110024.
- (ii) Regional Officer-Chandigarh, National Highways Authority of India, Bays No. 35-38, Sector-4, Panchkula-134112, Ph. No. - 0172-2583030, Email: rochandigarh@nhai.org, ronchaichd@gmail.com-for information and necessary action.
- (iii) Sh. C.M.Sinha, GM(T) (P&H) Mob: 9776136036, Email: cmsinha@nhai.org -with the request to take necessary action in terms of SoP dated 01.06.2017.
- (iv) Project Director PIU-Jalandhar, NHAI 31, Kalis Colony Jalandhar -144008. Tele no. 0181-2603627, Email ID: nhaijal181@yahoo.in, jal@nhai.org
- (v) M/s S.P.Singla Constructions Pvt Ltd. 47,Sector-9, Panchkula -134113, HR. Email: spscpl@gmail.com

15. In addition, the ICADR has also been superseded by New Delhi International Arbitration Centre w.e.f. 26.07.2019.

16. For the said reasons, the petition is allowed. The petitioner does not object to appointing of a Sole Arbitrator. The petition is disposed of with the following directions:

- i) Justice Adarsh Kumar Goel (Retd.) (Mob. No. 9910213040) is appointed as a Sole Arbitrator to adjudicate the disputes between the parties.
- ii) The arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi



hereinafter, referred to as the 'DIAC'). The remuneration of the learned Arbitrator shall be in terms of the Fourth Schedule of the Arbitration & Conciliation Act, 1996.

- iii) The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.
- iv) It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claim, any other preliminary objection, as well as claims on merits of the dispute of either of the parties, are left open for adjudication by the learned arbitrator.
- v) The parties shall approach the learned Arbitrator within two weeks from today.
- vi) The parties are entitled to raise all claims including the objections u/s 16 of the Arbitration and Conciliation Act, 1996.

JASMEET SINGH, J

FEBRUARY 28, 2024/DM

Click here to check corrigendum, if any