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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 3rd January, 2024

+ **ARB.P. 10/2024, I.A. 95/2024 & 96/2024**

MS SIMPLEX INFRASTRUCTURES LTD Petitioner

Through: Mr. Naveen R. Nath Sr. Adv, Ms. Lalit Mohini Bhat, Ms. Hetu Arora Sethi, Mr. Rahul Jain, Mr. Arjun Basra, Ms Gaytri Virmani, Ms Disha Gupta Advs. (M. 9810368590)

versus

**NATIONAL HIGHWAYS AUTHORITY
OF INDIA & ANR.**

..... Respondents

Through: Mr. Manish K. Bishnoi with Mr. Hitesh Lodwal, Advs. for R - NHAI (M. 9811548007)
Ms. Aastha Sharma, Advocate for R-2 (M-9971600589)

**CORAM:
JUSTICE PRATHIBA M. SINGH**

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through hybrid mode.
2. The present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (*hereinafter, 'the Act'*) has been filed by M/s Simplex Infrastructures Ltd. seeking nomination of the Arbitrators and permitting Petitioner to appoint its own nominee Arbitrators in terms of applicable rules.
3. The Petitioner had entered into a contract with the Respondent No.1 after the tender process, for the Rehabilitation and Upgradation to four lanes of NH-31D from km 113.200 to km 154.854 (Package-II A) Ghoshpukur-Salsalabari Section in the State of West Bengal on Engineering, Procurement and Construction (EPC) basis.



4. A supplementary agreement has been entered into between the parties on 1st April, 2021. According to the Petitioner, termination of contract took place dated 27th February, 2023 by the National Highway Authority of India (*hereinafter*, 'NHAI'), despite it adhering to the deadlines.
5. Disputes have arisen between the parties which led to filing of a Section 9 petition by the Petitioner which was disposed of vide order dated 30th May, 2023. An appeal against Section 9 order is still pending adjudication.
6. Conciliation proceedings have also failed between the parties.
7. On 13th June, 2023, the Petitioner invoked arbitration as per Clause 26.3 of the Society for Affordable Redressal of Disputes (SAROD) arbitration clause by issuing a notice for arbitration. The Petitioner nominated its arbitrator and requested the Respondent No. 1 to do the same so that the arbitral tribunal may be constituted. In the midst of these proceedings, the Petitioner received a communication via email on 20th June 2023 from the Respondent No. 1, refusing to nominate its arbitrator, stating that all three arbitrators must be selected from SAROD's list of Arbitrators.
8. It is the case of the Petitioner that the Respondents' interpretation of the Clause 26.3 is incorrect, as Clause 26.3.1 of the Contract Agreement only requires adherence to the rules of arbitration of SAROD and does not mandate nomination of arbitrators exclusively from their panel. As per Rule 11.2 of the SAROD Rules, only the Presiding Arbitrator is required to be appointed from SAROD's panel of arbitrators, who has to be nominated mutually by arbitrators appointed by the parties.
9. Further, the Respondent No.1 appointed Hon'ble Mr. Justice (Retd.) Sakha Ram Singh as its nominee Arbitrator. The case of the Petitioner is that it is entitled to appoint its nominee Arbitrator and such an Arbitrator need not



be from the SAROD arbitration panel.

10. Mr. Naveen R. Nath, Id. Senior Counsel relies upon the decision of the Id. Single Judge of this Court in ***CG Tollway Limited v. National Highway Authority of India and Anr., 2021 SCC OnLine Del 4838*** which arose out of a similar case governed by the SAROD rules, and was challenged before the Supreme Court. The Supreme Court had vide orders dated 18th November, 2021 and 17th February, 2022 considered the said challenge and had left the questions of law open arising in the petition. His submission is that in terms of SAROD rules, the nominee Arbitrator need not be from the SAROD panel, only the Presiding Arbitrator has to be from the SAROD panel.

11. The above said position is refuted by the Id. Counsel for the Respondent who relies upon the decision of the Supreme Court in ***Voestalpine Schienen GMBH v. Delhi Metro Rail Corporation Limited, (2017) 4 SCC 665***. It is his submission that in the said judgment, the Delhi Metro Railway Corporation (*hereinafter, DMRC*) panel consisting of ex-government employees including Engineers and persons who had served at high positions in the government were permitted to act as arbitrators in the panel of DMRC. The same was upheld even after amendment to Section 12 of the Act.

12. Id. counsel for SAROD points out that the arbitration panel is defined in Clause 2.2 of the SAROD rules as the panel maintained by SAROD.

13. The Court has considered the matter. There is no doubt that the issues that have been raised in this petition do deserve consideration. However, during the course of submissions, the Court has been pointed out to the panel which is maintained by SAROD which consists of eminent retired judges of the Supreme Court as also of various High Courts and other panelists. Considering the nature of the panel, it has been put to the parties as to whether



they would be agreeable for this Court to appoint two Arbitrators i.e. the Petitioner's nominee Arbitrator and the Presiding Arbitrator on its own leaving the questions of law open. Both the Id. Counsels have agreed after taking instructions.

14. Without going into the interpretation of Clause 11 of the SAROD rules, the following directions are accordingly issued:

- i) Mr. Justice (Retd.) Dr. S. Murlidhar is appointed as the nominee Arbitrator from the Petitioner's side;
- ii) Mr. Justice (Retd.) Sakha Ram Singh who is already appointed by the Respondent shall be the Respondent's nominee Arbitrator.
- iii) The Presiding Arbitrator shall be Ms. Justice (Retd.) Banumathi.

15. The question of law raised in respect of the interpretation of Clause 11 of the SAROD Rules, is left open for consideration in an appropriate case.

16. Petition is accordingly disposed of. All pending applications are also disposed of.

PRATHIBA M. SINGH
JUDGE

JANURARY 03, 2024

Rahul/bh