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

+ **O.M.P. (T) (COMM.) 1/2025, I.A. 222/2025, I.A. 223/2025**

NATIONAL HIGHWAYS AUTHORITY OF INDIA (NHAI)

.....Petitioner

Through: Mr. Manish K Bishnoi, Mr. Khubaib
Shakeel, Advs.

versus

M/S VARAHA INFRA LIMITED (VIL) AND ANR.....Respondents

Through: Mr. Rajeev Sharma, Sr. Adv. with
Mr. Abhishek Birthray, Mr. Nikhil
Sharma and Ms. Aiswarya Sahu,
Advocates for R-1

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

ORDER
14.01.2025

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1. The Petitioner has approached this Court challenging a letter dated 21.11.2024 issued by Respondent No.2 by which it has nominated/appointed Indian Road Congress wherein it has appointed an Arbitrator on behalf of the Petitioner for adjudicating the disputes which have arisen between the Petitioner and Respondent No.1.

2. Shorn of unnecessary details, the facts leading to this petition are as under:-

- i. The Petitioner issued the Request for Proposal (RFP) on 25.06.2015 for the Engineering, Procurement and Construction (EPC) Agreement for the improvement of Amritsar bypass by construction of additional structure and service roads of NH-1



between Km. 448+510 to Km 473+510.

- ii. It is stated that Respondent No.1 submitted its bid for the EPC contract. The bid of Respondent No.1 was accepted. A Letter of Award dated 04.09.2015 was issued in favour of the Respondent No.1 and Respondent No.1 was declared as the 'Selected Bidder'.
- iii. Disputes have arisen between the parties. The contract contains a dispute resolution clause being Clause 26.2 which deals with conciliation. Clause 26.3 deals with arbitration. Clause 26.3 of the contract which contains an arbitration clause, reads as under:-

"26.3 Arbitration

26.3 . 1 Any Dispute which is not resolved amicably 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 & 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.

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

(iii) 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.

(iv) 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.

(v) 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.

vi) The expenses incurred by each party 'in connection with preparation, presentation, etc., of its proceeding shall be borne by each party itself. (vii) The fees and expenses payable to the Arbitrators shall be as per the schedule of remuneration and expenses for Arbitrators notified by NHAI vide letter no. 11041/217/2007-Admin. Dt. 13th January 2010 reproduced herein below, or any amendment thereof:

<i>S. No.</i>	<i>Particulars</i>	<i>Schedule Amount payable per Arbitrator/per case</i>
<i>1</i>	<i>Arbitrator Fee</i>	<i>Rs. 15,000/- per day subject to a maximum of Rs. 4 lakhs per case</i> <i>Or</i> <i>Rs. 2.5 lakhs (lump sum)</i>



		<i>subject to publishing the Award within 12 months. 12 months will be reckoned from the date of first hearing.</i>
2	<i>Reading Charges</i>	<i>Rs. 15,000/-</i>
3	<i>Secretarial Assistance and incidental charges (telephone, fax, postage etc.)</i>	<i>Rs. 20,000/-</i>
4	<i>Charges for publishing/ declaration of the Award</i>	<i>Maximum of Rs. 20,000/-</i>
5	<i>Other expenses (actual against bills subject to the prescribed ceiling) - applicable for the days of hearing only.</i>	
	<i>Travelling Expenses Lodging and Boarding</i>	<i>Economy class by air, first class AC by train, AC car by road (i) Upto Rs. 15,000/- per day (metro cities) (ii) Upto Rs. 7,000/- per day (other cities) (iii) Rs. 3,000/- per day (own arrangement)</i>
6	<i>Local Travel</i>	<i>Rs. 1,500/- per day</i>
7	<i>Extra charges for days other than hearing I meeting days (maximum for 2 days)</i>	<i>Rs. 3,500/- per day</i>
Note	<i>1. Lodging, boarding and traveling expenses shall be allowed only for those members who are residing 100 kms away from place of meeting. 2. Delhi, Mumbai, Chennai, Kolkata, Bangalore and Hyderabad shall be considered as Metro cities.</i>	



26.3 .2 Deleted

26.3.3 The arbitrators shall make a reasoned award (the "Award"). Any Award made in any arbitration held pursuant to this Article 26 shall be final and binding on the Parties as from the date it is made, and the Contractor and the Authority agree and undertake to carry out such Award without delay.

26.3 .4 The Contractor and the Authority agree that an Award may be enforced against the Contractor and/or the Authority, as the case may be, and their respective assets wherever situated.

26.3 .5 This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder.

26.3.6 In the event the Party against whom the Award has been granted challenges the Award for any reason in a court of law, it shall make an interim payment to the other Party for an amount equal to 75% (seventy five per cent) of the Award, pending final settlement of the Dispute. The aforesaid amount shall be paid forthwith upon furnishing an irrevocable Bank Guarantee for a sum equal to 120 % (one hundred and twenty per cent) of the aforesaid amount. Upon final settlement of the Dispute, the aforesaid interim payment shall be adjusted and any balance amount due to be paid or returned, as the case may be, shall be paid or returned with interest calculated at the rate of 10% (ten per cent) per annum from the date of interim payment to the date of final settlement of such balance."

iv. It is stated that the Petitioner issued a letter dated 26.09.2022 to



- Respondent No.1 referring the matter for settlement through a meeting between Chairman, NHAI and Chairperson of Respondent No.1/company. It is stated that conciliation proceedings were not successful.
- v. Respondent No.1 issued a notice to the Petitioner on 06.10.2023 invoking arbitration. It is stated that vide letter dated 16.08.2024, Respondent No.1 requested Respondent No.2/Indian Roads Congress (IRC) for appointment of an arbitrator on behalf of the Petitioner/NHAI in terms of Clause 26.3.1(iv) of the Contract.
 - vi. It is stated that the Petitioner wrote a letter dated 17.09.2024 to the Respondent No.2/IRC relying upon Clause 26.3.1(iv) pointed out that since Respondent No.1 did not appoint/nominate its Arbitrator, there was no occasion for the Petitioner to appoint/nominate its arbitrator.
 - vii. It is stated that despite letter dated 17.09.2024 issued by the Petitioner, Respondent No.2/IRC vide letter dated 21.11.2024 appointed an arbitrator on behalf of the Petitioner purportedly acting under Clause 26.3 of the contract which contains an arbitration clause. Therefore, the Petitioner has approached this Court challenging the letter dated 21.11.2024.
3. It is the case of the Petitioner that a perusal of Clause 26.3 stipulates that the IRC could appoint an arbitrator only if Respondent No.1 appoints an arbitrator, intimates the Petitioner about the said appointment and the Petitioner fails to appoint its arbitrator.
4. It is the case of Respondent No.1 that a letter had been sent on 03.10.2024 from Respondent No.1 to the IRC with copy marked to the



Petitioner intimating the IRC about the appointment of a nominee Arbitrator by Respondent No.1 and therefore since the Petitioner has failed to appoint its arbitrator, the IRC was justified in appointing its arbitrator. It is further stated that the agreement also contains a schedule of fee of the arbitrator. However, it is stated by Respondent No.1 that the said schedule has been given a go by and a fresh schedule has been drawn which is commensurate to the schedule of fee under the Arbitration & Conciliation Act.

5. Material on record therefore suggests that Respondent No.1 appointed its arbitrator.

6. Learned Counsel for the Petitioner submits that the Petitioner will appoint its arbitrator and that it nominates of name of Justice Pradeep Nandrajog, former Chief Justice of the Bombay High Court. The learned Counsel for the Respondent, on instructions, states that his client is willing appoint the Arbitrator appointed by the Petitioner. Both the Counsels state that instead of the two Arbitrators deciding the third Arbitrator, this Court can appoint the presiding Arbitrator.

7. In view of the consent given by both sides, this Court is inclined to appoint Justice Shiv Kirti Singh, former Judge of the Supreme Court of India, (Mob: 9899016327) as the presiding Arbitrator.

8. The arbitration would take place under the aegis of the Delhi International Arbitration Centre (DIAC) and would abide by its rules and regulations. The learned Arbitrator shall be entitled to fees as per the Schedule of Fees maintained by the DIAC.

9. The learned Arbitrator is also requested to file the requisite disclosure under Section 12(2) of the Arbitration & Conciliation Act within a week of entering on reference.



10. 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.
11. Needless to say, nothing in this order shall be construed as an expression of this Court on the merits of the contentions of the parties.
12. The present petition stands disposed on the basis of the consent of both sides of in the above terms along with pending application(s), if any.

SUBRAMONIUM PRASAD, J

JANUARY 14, 2025

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