

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

ARB.P. 50/2008

Date of decision : 25.02.2008

IN THE MATTER OF :

#M/S BALRAJ CONSTRUCTION & ANR. ...Petitioners

! Through : Mr. Atul Batra, Adv.

Versus

\$MCD ... Respondent

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Through : Mr. Sanjeev Sabharwal
with Mr. Alok Singh, Adv. with
Mr. S.C. Yadav, A.E., MCD

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*** HON'BLE MS.JUSTICE HIMA KOHLI**

1. Whether Reporters of Local papers may
be allowed to see the Judgment? no
2. To be referred to the Reporter or not? no
3. Whether the judgment should be
reported in the Digest? no

HIMA KOHLI, J. (ORAL)

1. The present petition is instituted by the petitioners
under Section 11 of the Arbitration & Conciliation Act, 1996

praying inter alia for appointment of a sole arbitrator in terms of Clause 25 of the General Terms and Conditions of the contract, which clause is not denied by the respondent. Though a copy of the aforesaid contract is not placed on the record, counsel for the petitioner hands over a copy thereof, which is taken on the record. Clause 25 deals with settlement of disputes and arbitration which is reproduced herein below :

" 25 : Settlement of Disputes & Arbitration:

Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specifications, design, drawings and instructions here-in-before mentioned and as to the quality of workmanship or materials as used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:

- (i) If the contractor considers any work demanded of him to be

outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the Engineer-in-Charge on any matter in connection with or arising out of the contract of carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Superintending Engineer in writing for written instruction or decision. Thereupon the Superintending Engineer shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter.

If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of Superintending Engineer's decision, appeal to the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractors appeal. If the contractor is dissatisfied with this decision, the contractor shall within a period of 30 days from receipt of the decision, give notice to the Commissioner M.C.D. for

appointment of arbitrator failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

(ii) Except where the decision has become final, binding and conclusive in terms of Sub para (i) above disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Commissioner M.C.D. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is a term of this contract that the party invoking arbitration shall give a list of disputed amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and reference to the rejection by the Chief Engineer of the appeal.

It is also a term of this contract that no person other than a person appointed by such Commissioner M.C.D. as aforesaid should act as arbitrator and if for any reason that is not

possible, the matter shall not be referred to arbitration at all.

It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-Charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the M.C.D. shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs.1,00,000/- the arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the arbitrator these shall be paid equally by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and or the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid."

2. Vide work order dated 5.10.2004, the petitioner was awarded the work of "providing Outfall drainage system for Sidhartha Extension, Pocket-A in Ward No.6". An agreement dated 19.11.2004 was entered into between the parties subsequently and work commenced on the site on 14.10.2004. Counsel for the petitioners states that the petitioner had completed the laying of outfall connection of S/W drainage from Pocket-A Sidhartha Extension to Baratula Nala via Pocket-B, Sidhartha Extension well in time, but it was not furnished

the construction plan and design and soil testing reports by the respondent, which document the petitioner kept demanding from time to time. It is stated that subsequently, the excavation work was started at the site by the petitioner on the oral instructions of the respondent but on account of heavy rainfall on 5-6th August, 2005, the pit was filled on urgent basis as there was a likelihood of damage to flats in Siddhartha Extension. This was followed by institution of a writ petition by the residents of the area, being WP(C) No.23745/2006. It is stated that due to injunction orders passed in the aforesaid writ petition, the work of the petitioner got stopped and was restarted in May, 2006.

3. Counsel for the petitioner submits that the petitioner wrote a series of letters to the respondent requesting it for payment for the work already executed and also for taking into account the extra work undertaken by the petitioner on account of delay which was beyond the control of the petitioner. The last letter/notice issued by the petitioner to the Commissioner of the respondent/MCD is dated 23rd

October, 2007, whereunder the petitioner called upon the respondent to pay additional costs and expenses as detailed in para 13 thereof and also informed the respondent that in case the respondent does not settle the claims of the petitioner as contained in the aforesaid letter, within 30 days from the date of the receipt of the notice, in that eventuality, the petitioner shall invoke the arbitration clause and call upon the respondent to appoint an arbitrator.

4. The counsel for the respondent neither denies the arbitration clause, nor does he deny the receipt of the aforesaid notice dated 23rd October, 2007. He submits that vide receipt dated 9.11.2005, the petitioner accepted a sum of Rs.2,89,233/- in complete settlement of all claims regarding the work. The original file showing the endorsement of the petitioner is produced in the Court. Counsel for the respondent also refers to a letter dated 12.10.2007 issued by the respondent to the petitioner, wherein it was stated that the final bill against the work, subject matter of the present petition, was prepared by the respondent for a sum of

Rs.65,518/-, which amount was pending acceptance at the petitioners' end. It is stated that apart from the aforesaid sum of Rs.65,518/- and the refund of security deposit of Rs.3,00,000/-, lying with the respondent, nothing further is due or payable to the petitioners.

5. Counsel for the petitioners disputes the aforesaid position and states that the respondent has not been able to place anything on record to show that the final bill referred to in the letter dated 12.10.2007 issued by the respondent to the petitioner was accepted by the petitioner in full and final settlement of all its claims against the respondent.

6. In view of the aforesaid position, it is established that the respondent has neither appointed an arbitrator in terms of the demand notice dated 23rd October, 2007 issued by the petitioner within 30 days from the date of the receipt of the notice, nor has the respondent appointed an arbitrator prior to the institution of the present petition i.e, on or before 25th February, 2008. Instead, the respondent admits that till date, it has not appointed any arbitrator.

7. In the aforesaid circumstances, the respondent has forfeited its right to appoint an Arbitrator. In the case of Datar Switchgears Ltd. Versus Tata Finance Ltd. & Anr., reported in **IV (2000) CLT 191 (SC)=VII (2000) SLT 543=JT 2000 (Suppl.2) SC 226**, the Supreme Court has held that if the vacancy of an arbitrator is not filled till the party approaches the Court and files a petition for appointment of an arbitrator by the designated authority of the Chief Justice of that Court under Section 11(6) of the Arbitration and Conciliation Act, the right to supply the vacancy by the opposite party stands extinguished. The ratio of the aforesaid case was approved by the Supreme Court in Punj Lloyed Ltd. Versus Petronet MHB Ltd., reported in **(2006) 2SCC 682** and it was again followed by a Division Bench of this Court in the case of Delkon (India) Pvt. Ltd. Versus G.M. Bharat Heavy Electricals Ltd., reported in **120 (2005) DLT 542 (DB)**.

8. In view of the aforesaid judgments, the respondent has lost its right to appoint an Arbitrator, it having failed to do so within 30 days from the date of receipt of the notice from

the petitioner for appointment of an Arbitrator or even prior to the institution of the present petition.

9. In these circumstances, it is deemed appropriate to allow the present petition. Mr.S.S. Bal (Retd. ADJ) (32/34, M.B. Road, New Delhi, Mobile No.9810655422 and 29536905) is appointed as the sole Arbitrator to adjudicate all the disputes arising between the parties. The parties shall share the fee equally, which shall be fixed by the Arbitrator. The parties shall appear before the Arbitrator on 7th April, 2008 at 4.30 P.M.

10. In the meantime, pleadings shall be completed by both the parties by filing their respective claims, replies and rejoinders and relevant documents within four weeks, while exchanging copies thereof with each other. Admission/denial of documents shall be conducted by each party on the list of documents furnished by the other side in the fifth week. When both the parties appear before the arbitrator on the date fixed, they shall place on record their respective pleadings as also the admission/denial carried out by each of the parties in

respect of the documents of the other side, for the arbitrator to take the proceedings further from that point.

11. The Registry is directed to forward a copy of the order to the Arbitrator forthwith. The parties are also directed to intimate the Arbitrator about the order.

12. The petition is disposed of.

HIMA KOHLI,J

FEBRUARY 25, 2008
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