

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

+ **ARB.P. NO.275/2010**

Date of Decision : 03.02.2011

M/S GEO MILLERAND CROSS OBJECTOR. PVT. LTD.

..... Petitioner

Through: Mr.S.D.Singh, Advocate.

Versus

MUNICIPAL CORPORATION OF DELHI **..... Respondent**

Through: Mr.O.P.Saxena, Adv. for
respondent no.2.

AND

ARB.P.NO.276/2010

M/S GEO MILLER AND CROSS OBJECTOR. PVT. LTD.

..... Petitioner

Through: Mr.S.D.Singh, Advocate.

Versus

MUNICIPAL CORPORATION OF DELHI **..... Respondent**

Through: Mr.Jitendra Kumar, Adv.
for MCD.
Mr.O.P.Saxena, Adv. for
respondent no.2.

CORAM:

HON'BLE MR. JUSTICE V.K. SHALI

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|----|---|----|
| 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 |

V.K. SHALI, J. (oral)

1. The learned counsel for the respondent no.2 seeks further time to obtain instructions. The request for the same is disallowed as the respondent no.2 has already been given

more than sufficient time to obtain instructions or alternatively file reply.

2. I have heard the learned counsel for the parties and perused the record.
3. These are petitions filed by the petitioner under Section 11(6) of the Arbitration and Conciliation Act, 1956 (hereinafter referred to as an 'Act') for appointment of an Arbitrator.
4. Briefly stated the facts as averred in the petition are that the petitioner(s) was awarded a contract known as the '2 MLD Sewage Treatment Plant at Holambi, Delhi (under Yamuna Action Plan)' vide agreement dated 28.11.2001. The value of the total contract was fixed at ₹1,27,70,000/-. The scope of the work as per the agreement was clearly mentioned to be as 'build, operate and transfer of 2 MLD Capacity Sewage Treatment Plant at Squatter Resettlement Colony Tikri Khurd, Delhi (under Yamuna Action Plan)' (Annexure P-1). It is alleged that the petitioner was given the job to operate and maintain the said plant for a period of five years starting from 1.2.2003 to 31.1.2008, and having performed his part of the obligation of commissioning, operating and maintaining the plant, the petitioner was entitled to get the necessary payment w.e.f. 1.2.2003.
5. It is alleged by the petitioner that the last amount which was received by the petitioner was to the tune of ₹1,44,493/- on 6.8.2007 while as an amount of ₹41,40,000/- was still due

and payable. On account of this non-payment of the amount, the petitioner in terms of Clause 25 of the Agreement wrote a letter to the Superintending Engineer for settlement of dispute and requested him to release the aforesaid amount vide letter dated 6.3.2010 (annexure P-2).

6. It is alleged that the Executive Engineer sent an irrelevant query on 25.3.2010 and made allegations against the release of payment. On 16.4.2010, the petitioner personally met the Chief Engineer and filed an appeal in terms of the aforesaid clause. However, the Appellate Authority namely, the Chief Engineer, failed to take a decision within 30 days from the date of filing of appeal which expired on 15.5.2010. It is alleged by the petitioner that as the petitioner failed to get any redressal in terms of Clause 25 of the Agreement by approaching firstly, the Superintending Engineer and then the Chief Engineer, he was constrained to issue notice dated 10.6.2010 to the competent authority namely, The Municipal Commissioner, MCD for appointment of an Arbitrator.
7. In the representation, the petitioner had formulated the question with regard to his grievance and the same were reiterated in the notice dated 10.6.2010 as required by the Clause 25 of the Agreement between the parties. The relevant portion of the said clause reads as under:-

“It is a term of this contract that the party invoking arbitration shall give list of disputes with amounts claimed in respect of each dispute along with the notice for appointment

of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal”

8. Since the respondent/MCD failed to appoint the arbitrator in terms of Clause 25 of the agreement within 30 days, the petitioner was constrained to file the present petition on 16.9.2010 for appointment of an arbitrator.
9. The petition came to be listed on 01.10.2010 when notice was directed to be issued to the Municipal Commissioner, MCD.
10. The learned counsel for the MCD had put in appearance on 11.1.2011 and stated that the Government of NCT of Delhi had issued a notification according to which w.e.f. 30.8.2010, the work pertaining to ‘Slum and JJ Department’ which was previously being looked after by the MCD was shifted to Delhi Urban Shelter Improvement Board under Section 31 of the Delhi Urban Shelter Improvement Board Act, 2010. In terms of the said notification, it was urged that the Delhi Urban Shelter Improvement Board (hereinafter referred to as ‘Board’) was the successor body of the MCD dealing with the contract in question. It was alleged that the Board may be made as a party and the respondent no.1 has nothing to do with the same. A copy of notification has been placed on record. The petitioner impleaded the Board as respondent no.2 and accordingly, notice was issued to the Chairman of the Board also.
11. Mr.O.P.Saxena, learned counsel for the Board appeared on 13.1.2011 and sought time to obtain instructions. Further

time was sought on 20.1.2011 when the matter was directed to be listed on 3.2.2011.

12. Today again, a request for adjournment has been made, which has already been turned down. There is no dispute about the fact that the petitioner had entered into the contract with the then MCD to build, operate and transfer of the Sewage Treatment Plant in question and in terms of Clause 25 of the Agreement, in the event of the grievance of the petitioner being not adjudicated by the Superintending Engineer or by the Appellate Authority, the petitioner could invoke the Arbitration Clause and accordingly, the Municipal Commissioner was competent to appoint the Arbitrator. The petitioner had formulated the disputes with regard to his grievance in the appeal to the Appellate Board, yet the appeal was not considered within the period of 30 days as envisaged in the agreement and accordingly, this necessitated the issuance of notice dated 10.6.2010 to the Municipal Commissioner.
13. By the learned counsel for the MCD or even for the Board, it has not been disputed that notice has been issued to them. The MCD has filed an affidavit to the effect that w.e.f. 30.8.2010 the Board has been constituted and work in question has been transferred to the Board. The learned counsel for the Board has neither filed reply nor obtained instructions with regard to the appointment of an Arbitrator

by the Court. Further, they have even failed to appoint an Arbitrator. The aforesaid facts clearly show that at the time when the disputes were raised, the work pertaining to Sewage Treatment Plant was being dealt with by the 'Slum and JJ Department' which was an integral part of the MCD and therefore, the Municipal Commissioner in terms of Clause 25 of the Agreement, was entitled to appoint an Arbitrator. According to the averment made, notice dated 10.6.2010 was sent to the Municipal commissioner, the receipt of which has not denied by the MCD or by its successor body i.e. the Board. Therefore, if a reasonable time is excluded for the service of the notice, it would be assumed that notice was delivered to the Municipal Commissioner, MCD on or about 12/13 July, 2010 and the Municipal Commissioner was under an obligation to appoint an Arbitrator within 30 days from the date of receipt of the said notice. This period of 30 days had lapsed on 12/13 August, 2010 while as the Board has been constituted on 30.8.2010. Therefore, it was essentially for the MCD to appoint an arbitrator in terms of Clause 25 of the Agreement. So far as the disputes are concerned, they were formulated by the petitioner in the appeal, which are being reproduced hereinunder:-

“

List of Disputes

The crux of the disputes between our company and department are being mentioned herein below:

- A) Whether the MCD can be justified in not making the payment due and payable to M/s Geo Miler and Co. Pvt. Ltd. arising out of

Contract 2 MLD Sewage Treatment Plant at Holambi bearing agreement no.67/EE (S) DDI/2001-02 dated 28.11.2011.

B) Presently a sum of Rs.41.40 lacs along with interest @18% since 1.3.2010 is payable to Geo Miller and Co. Pvt. Ltd. and details whereof are given herein below:-

1) <u>Capital Cost</u>		
With held in Civil Works	1.16	
With held in Mechanical Works	1.67	
Security Deposit	<u>1.33</u>	4.16
2) <u>Operation & Maintenance Charges</u>		
From Sept. 06 to Jan. 08	9.75	
Deductions from O & M Bills	10.12	
Reimbursement of Service tax	1.46	
Reimbursement of WCT	1.30	
Retention /Security Deposit	<u>0.64</u>	23.27
3) <u>Interest</u>		
On capital cost		
from 1.3.03 to 28.2.10	5.24	
i.e. 7 yrs. @ 18% P.A. on 4.16 lacs		
On O & M from 1.2.08 to 28.2.10		
i.e. 25 months @18% P.A. on 23.7 lacs		
	<u>8.73</u>	<u>13.97</u>
<u>Total of (1+2+3)</u>		<u>41.40"</u>

14. In view of the aforesaid facts, section 11 (6) of the Act clearly lays down that:

“Where, under an appointment procedure agreed upon by the parties—

a) a party fails to act as required under that procedure; or

b)

c)

a party may request the Chief Justice or any person or institution designated by him to take the necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment.”

15. It is pertinent here to mention that relying on the judgment

rendered in ***Datar Switchgears Ltd. vs. Tata Finance Ltd. & Anr. (2000) 8SCC 151***, it was observed by the Supreme Court in ***Union of India vs. Bharat Battery Manufacturing Co. (P) Ltd. (2007) 7 SCC 684*** that

“Once a party files an application under S.11 (6), the other party extinguishes its right to appoint an arbitrator in terms of clause of agreement.”

the light of the abovementioned judgments, the respondent/MCD which was a necessary as well as a proper party ought to have got an arbitrator appointed latest by 12/13 August, 2010 in furtherance of the notice issued to them. Since this is not been done till date, either by the MCD or even by the Board (successor body) which had been given a reasonable opportunity to appoint an Arbitrator, both of them are deemed to have forfeited their right to appoint an Arbitrator in terms of section 11(6) of the Act.

15. I accordingly, allow the petition and appoint Sh. S. M. Chopra, the learned Additional District Judge (Retired) as the sole Arbitrator to adjudicate the disputes which are raised by the petitioner herein.
16. The respondent/ Board shall be free to raise such preliminary objections including the objections on merit and filing of counter claim as it may feel necessary. The Arbitrator shall be governed so far as the payment of fees is concerned by the fee schedule prescribed by the Delhi High Court Arbitration and Conciliation Centre.

17. With these directions, the petitions of the petitioner stand allowed.

FEBRUARY 03, 2011
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V.K. SHALI, J.