

HIGH COURT OF TRIPURA
_A_G_A_R_T_A_L_A_
ARB P No.10 of 2023

Sri Jahar Sur Choudhury, Contractor

..... Petitioner(s)

V E R S U S

The State of Tripura and others

..... Respondent(s)

For Petitioner(s) : Mr. H. Sarkar, Advocate.

For Respondent(s) : Mr. K. De, Addl. G.A.

HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH

_O_R_D_E_R_

14.12.2023

This petition is for appointment of an Independent Arbitrator in terms of Section 11(6)(a) of the Arbitration and Conciliation Act, 1996 as amended. This Court, by order dated 23.11.2023, after hearing the parties and on consideration of pleadings on record, proposed to appoint Sri Subash Sikdar, retired Grade-I Judicial Officer of Tripura Judicial Service, Sankar Chowmuhani, P.O. Agartala, West Tripura, as the Arbitrator to adjudicate the dispute between the parties. Order dated 23.11.2023 is extracted hereunder :

“Petitioner seeks appointment of an Independent Arbitrator by invoking Clause 22.2 of the agreement [Annexure-2] under Section 11(6)(a) read with Section-12 of the Arbitration & Conciliation Act, 1996 as amended. The work order is dated 19.06.2018 [Annexure-1]. He submits that the work of construction of District Administration Complex, Sepahijala District, Tripura could not be completed by 20.08.2020 though it was completed and handed over by 15.10.2021. Thereafter, he has sought refund of the security deposit and payment of contractual dues etc. He has approached the respondent No.3-the Executive Engineer, P.W.D. (R&B), Bishramganj Division, Bishramganj, Sepahijala vide letter dated 27th December, 2022 [Annexure-5]. Thereafter he has approached the Superintending Engineer, 4th Circle, PWD(R&B), Netaji Choumohani, PWD Complex, Agartala vide letter dated 03.04.2023 [Annexure-6] and finally has approached the respondent No.2-the Chief Engineer, PWD, (Building), Capital Complex, Kunjaban, Agartala vide letter dated 19.04.2023 [Annexure-7]. Since there is no response, the petitioner has approached this Court for appointment of an Independent Arbitrator.

[2] The respondents have filed counter affidavit pursuant to the order dated 14.09.2023 inter alia taking the following stand to oppose the prayer for appointment of an independent arbitrator:

(i) That the arbitration petition is barred by delay as the work was completed on 15.10.2021 while the request for appointment of an arbitrator has been made before this Court on 4th August, 2023 that is after lapse of about 21 months. The scheduled date for completion of the work was 20.08.2020.

(ii) Respondents also have made statements at para 9, 10 and 11 as to the payments made in favour of the petitioner. The work for construction of District Administration Complex, Sepahijala District, Tripura was estimated at Rs.14,59,75,730. Payments have been made from time to time as per submitted running account bills and as per availability of funds. Out of balance amount of Rs.15,88,411/- (Provisional) of the final bill, Rs.8,00,000/- has already been paid vide voucher No.113 dated 18.03.2023. The outstanding amount of Rs.7,88,411/- which has to be paid to the contractor (the petitioner) is subject to approval of the Final deviation/ Extra item/ Substitute item statements by the Competent Authority and the same is under process. 90% of the price escalation bills up to 6th running account amounting to Rs.47,34,366/- has already been paid to the petitioner. Rest 10% amount i.e. approximately Rs.5,26,000/- will be paid after approval of Final deviation/ Extra item/ Substitute item statements and availability of fund with the D.D.O. The price escalation bills with respect to 7th, 8th and 9th running account bills amounting to Rs.30,90,759/- approx. (provisional) for the periods beyond the stipulated period of completion have been resubmitted to the Superintending Engineer, 4th Circle, PWD (R&B), Agartala and further forwarded to the Chief Engineer, PWD(Buildings) along with copies of time extension approval, Hindrance Register, Site Order Book etc. for approval as per Clause-44 of the Agreement.

(iii) In reply to para 8 of the petition, the Respondents in para 13 have partially agreed to the claim of the petitioner but they have also stated that the schedule of claim amounting to Rs.1,41,75,454/- plus interest and cost of arbitral proceedings is abnormally on higher side.

(iv) Respondents further said that the Executive Engineer has communicated his reply on 12.01.2023 to the letter dated 27.12.2022 (Annexure-5) which is for payment of the outstanding dues within a period of thirty days failing which he would be compelled to claim other compensation. In respect of the letter dated 19th April, 2023 (Annexure-7) addressed to the Chief Engineer, PWD (Building), Sectt. Complex, Kunjaban, Tripura, the comments of the Executive Engineer, PWD(R&B), Bishramganj Division, Bishramganj, Sepahijala, Tripura was communicated vide letter dated 04.05.2023 with copy to the Chief Engineer, PWD(R&B), Tripura, Agartala also. A status report was also communicated by the Executive Engineer, PWD(R&B), Bishramganj Division, Bishramganj, Sepahijala, Tripura in response to the letter dated 6th May, 2023 of the Nodal Officer, PWD(R&B). The subject matter of all the letters of the Executive Engineer, PWD(R&B), Bishramganj Division, Bishramganj, Sepahijala, Tripura as mentioned in this para does not refer to the subject matter of the statement of counter claim also. According to the respondents except Rs.8,00,000/- other payments have already been made and full security deposit has been refunded. Balance price escalation bill will be paid after observing required formalities. Payments against overhead expense, interest etc. are not permissible as per clause of agreement. They have also taken a plea that the execution of the work was delayed with time over run of 438 days for various reasons and such time over run was granted by the competent authority without levy.

[3] In the aforesaid factual background, learned counsel for the respondent-State submits that the contractor had primarily failed to discharge his contractual liability due to his own fault and lapse and therefore, no dispute is required to be referred to any arbitrator.

[4] Learned counsel for the petitioner in reply submits that the stand of the respondents shows that the claim is not stale as the work was completed during COVID period and time extension was also granted. It also shows that part

payments have been made to the petitioner and certain running account bill are yet to be paid. Petitioner has followed the procedure by approaching the Engineer-in-charge and the Superintending Engineer as well as the Chief Engineer of the PWD department before approaching this Court for appointment of an independent arbitrator under Clause-22 of the agreement. He has followed the procedure described for invocation of the arbitration clause. Since the respondents have accepted that the claims are pending though they said that it is abnormally high, there exists a dispute which is referable for arbitration in terms of the agreement entered into between the parties. As such, this court may appoint an independent arbitrator to adjudicate the dispute between the parties.

[5] I have considered the submission of the parties and taken note of the pleadings placed from the records. Clause 22 of the agreement at Annexure- 2 contains the arbitration clause, which is extracted hereunder:

“22. Settlement of disputes:

22.1 If any dispute or difference of any kind whatsoever arises between the department and the Contractor in connection with, or arising out of the Contract at stage, whether during the progress of the works or after their completion and whether before or after the termination, abandonment or breach of the Contract, it shall in the first place, be referred to and settled by the Engineer-in-charge who shall, within a period of twenty days after being requested by the Contractor to do so, give written notice of his decision to the Contractor. Upon receipt of the written notice of the decision of the Engineer-in-Charge the Contractor shall promptly proceed without delay to comply with such notice of decision.

22.2 If the Engineer-in-Charge fails to give notice of his decision in writing within a period of twenty days after being requested or if the Contractor is dissatisfied with the notice of the decision of the Engineer-in-Charge, the Contractor may within fifteen days after receiving the notice of decision appeal to the concerned Superintending Engineer of Department who shall after affording opportunity of being heard shall give notice of his decision within a period of thirty days. After Superintending Engineer has given written notice of his decision to the Contractor and no claim to arbitration, has been communicated to him by the Contractor within a period of fifteen days from receipt of such notice the said decision shall remain final and binding on both side. If the Superintending Engineer fails to give notice of his decision, as aforesaid within a period of thirty days after being requested as aforesaid, or if the Contractor be dissatisfied with any such decision, then and in any such case the contractor within thirty days after the expiration of the first named period of thirty days as the case may be, require that the matter or matters in dispute be referred to arbitration as detailed below:-

SETTLEMENT OF CLAIMS:

All disputes or difference arising of or relating to the Contract shall be referred for the adjudication as follows:

- a) Claims up to a value of Rupees 50,000/-
- Superintending Engineer of another circle in the same department.
- b) Claims above Rs.50,000/-
- Another Chief Engineer or Arbitrator appointed by the Chief Engineer of the same department.

The arbitration shall be conducted in accordance with the provisions of Indian Arbitration and Conciliation Act 1996 or any statutory modification thereof.

The arbitrator shall state his reasons in passing the award.

A reference for adjudication under this clauses shall be made by the contractor within six months from the date of intimating the contractor of the preparation of final bill or his having accepted payment whichever is earlier. Only contracts executed in Tripura shall have jurisdiction for any suit arising out of this contract. More particularly no suit shall be instituted or entertained in any court outside the State arising out of contract.”

[6] Upon hearing the learned counsel for the parties and the pleadings on record including the stand of the respondents, it appears that the petitioner’s claim for outstanding dues on certain heads are pending with the respondent authorities. He has also approached the concerned Executive Engineer-respondent No.3, the Superintending Engineer and the Chief Engineer-respondent No.2 before approaching this court for appointment of an independent arbitrator. As such, this court is of the view that petitioner has made out a case for appointment of an independent arbitrator. Learned counsel for the petitioners and the respondent-State on being asked agreed to the appointment of Sri Subash Sikdar, Retired Grade-I Judicial Officer of Tripura Judicial Service, Sankar Chowmuhani, P.O-Agartala, West Tripura, for adjudication of the dispute between the parties. The Registry is directed to communicate the instant order to the proposed arbitrator for his consent and declaration in terms of schedule-VII read with Section 12 of the Arbitration and Conciliation Act, 1996 as amended within a period of 3(three) weeks from the date of receipt of the copy of this order.

Accordingly, list the matter on **14.12.2023**.

The proposed Arbitrator has submitted his consent and declaration in terms of 6th Schedule read with Section 12(1)(b) of the Arbitration and Conciliation Act, 1996.

Learned counsel for the parties submit that Mr. Subhash Sikdar may now be appointed as an Arbitrator to adjudicate the dispute between the parties.

Having regard to the reasons recorded in the order dated 23.11.2023 as extracted above and on submission of the requisite consent and declaration by the proposed Arbitrator, I hereby appoint Sri Subash Sikdar, Retired Grade-I Judicial Officer of Tripura Judicial Service, Sankar Chowmuhani, West Tripura, Agartala as an Arbitrator to decide the dispute between the parties. While prescribing the fees for the Arbitration proceedings, the learned Arbitrator would take into regard the ceiling laid under IVth Schedule of the Act of 1996. The learned Arbitrator is also requested to keep

into mind the timeline prescribed for declaration of an award in terms of Section 29-A of the Act of 1996.

Let the order along with the copy of the entire pleadings of this arbitration petition be communicated to the learned Arbitrator Mr. Subash Sikdar by the Registry.

Arbitration petition is disposed of accordingly.

(APARESH KUMAR SINGH), CJ

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