

**HIGH COURT OF TRIPURA
AGARTALA**

Arb.P. No.01/2024

Royal Infraconstru Limited, represented by its Project Manager, having its registered office at Godrej Waterside Building, Tower No.1, 4th Floor, No.401, Plot No.5, DP Block, Salt Lake, Sector-V, Kolkata-700001.

..... Petitioner(s).

V E R S U S

1. The State of Tripura, represented by its Secretary, PWD Department, Government of Tripura, New Capital Complex, Agartala, West Tripura.

2. The Secretary, PWD Department, Government of Tripura, New Capital Complex, Agartala, West Tripura.

3. The Chief Engineer, Public Works Department (R&B), Government of Tripura, Agartala, West Tripura, PIN-799010.

4. The Superintending Engineer, 3rd Circle, Public Works Department (R&B), Government of Tripura, Udaipur, Gomati Tripura, PIN-799120.

5. The Engineer-In-Charge, Santir Bazar Division, South Tripura, Public Works Department (R&B), Government of Tripura, P.O.-Santir Bazar, District-South Tripura, PIN-799144.

.....Respondent(s).

For Petitioner(s) : Mr. Kundan Pandey, Advocate.

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

HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH

Order

14/08/2024

Heard Mr. Kundan Pandey, learned counsel appearing for the petitioner and Mr. Karnajit De, learned Addl. Government Advocate appearing for the respondents-State.

2. Petitioner approached this Court for appointment of an independent Arbitrator in connection with Memorandum of Understanding dated 07.01.2009 (Annexure-2) arrived at between the parties under Section 11(6) read with Section 12 of the Arbitration and Conciliation Act, 1996 as amended.

3. The case of the petitioner is captured in the order dated 04.07.2024 which is extracted hereunder:

"Heard Mr. Kundan Pandey, learned counsel appearing for the petitioner and Mr. Karnajit De, learned Addl. Government Advocate appearing for the respondents-State.

2. The Memorandum of Understanding (MOU) at Annexure-2 arrived at between the parties pursuant to issuance of Letter of Intent (LOI) is in the nature of an agreement wherein clause 19(b) provides for adjudication of dispute through arbitration. Annexure-1 is the Letter of Intent (LOI) dated 11.12.2008 for award of projects to CPSU and private sector construction agencies on Cost-Plus percentage basis in which the petitioner was asked to appear before the office of the Superintending Engineer, Planning Circle, PWD, Agartala for proceeding further for signing the MOU and arranging award of the work. Paragraph-6 of the LOI indicates that the contract will be operated by the terms and conditions of the MOU.

3. As per the MOU signed on 07.01.2009 the stipulated date of completion was 26.12.2010. The defect liability period for the project was one year. The subsequent chronology of dates furnished in the application show that the date of completion of the work was 19.03.2016. Respondents also issued completion certificate on 15.12.2017. Thereafter, arose the dispute since petitioner claims that even after expiry of defect liability period, security deposit of Rs.25,00,000/- was not released. He also claimed that VAT increase percentage was not paid to the tune of Rs.39,31,267/-. Petitioner had made representations through letter dated 11.09.2017 and 13.04.2018. Petitioner had also submitted representation before Commissioner of Taxes on 25.03.2019. The Additional Commissioner of Taxes had asked the Superintendent of Taxes to ascertain whether any excess amount of VAT had been paid as per letter dated 27.03.2019. Petitioner has also referred to letter dated 05.05.2018 issued by the Superintending Engineer, Planning & Design, Agartala to the Superintending Engineer, 3rd Circle regarding the balance of final deviation amount. Petitioner had also made representation on 21.10.2021 before the Executive Engineer, PWD for release of bills.

4. Mr. Kundan Pandey, learned counsel for the petitioner, submits that based on these claims, petitioner would be entitled to receive Rs.8,23,83,031/- and interest withheld amount of Rs.6,80,56,267/- between the period from 2016 to 2023. Petitioner had issued notice through his counsel as per Clause-18 of the MOU to the Engineer-in-Charge on 27.06.2023. Thereafter, petitioner again issued notice under Clause-18.2 of the MOU to the Superintending Engineer, PWD, Government of Tripura on 08.08.2023. He thereafter invoked the arbitration clause 19(b) of the MOU by letter dated 22.09.2023 addressed to the Chief Engineer, PWD (R&B) along with a panel of Arbitrators proposed to be appointed. He received no reply from the respondents. Thereafter, he approached this Court.

5. The first counter affidavit of the respondents states that the petitioner's tender was accepted for construction of 11(eleven) nature of works. The names and details of the bridges are furnished at paragraph-3 of the counter affidavit. Detailed Project Report (DPR) submitted by the petitioner was

approved by the competent authority and he was directed to commence physical work as per the approved DPR.

6. Mr. Karnajit De, learned Addl. Government Advocate appearing for the State, has referred to the direction of Additional Commissioner of Taxes, Government of Tripura to the Superintendent of Taxes, Charge-VII, Kar Bhavan, Agartala to take necessary action as per provisions of the TVAT Act and Rules made thereunder to ascertain whether the petitioner had paid any excess amount of VAT and is entitled to claim any refund or not. In case any excess amount is ascertained as paid by the petitioner, he may proceed for refund of the same as per provisions of the TVAT Act and Rules made thereunder. However, learned counsel for the respondents-State submits that claim relating to refund of excess taxes paid are not arbitrable disputes as they are sovereign in nature as held by the Apex Court in the case of *Vidya Drolia and Ors. Vs. Durga Trading Corporation* reported in (2021) 2 SCC 1.

7. The respondents have in so many words attributed the delay in execution of the contract upon the petitioner. Petitioner had submitted the price variation bills after the contract and extended date of completion of the work in question. Such final price variation is subject to approval by the competent authority as per norms of the MOU. Respondents also dispute the claim for incentives as per Clause-12 of the MOU for early completion as it is an optional clause. The same will be decided by the competent higher authority. The respondents also have made statements to the effect that factual aspects regarding determination of payment liability are subject to the terms and conditions of the contract and satisfactory performance by the contractor. However, if the entire contract component is vitiated by malice or criminal interest, no payment need be made pending criminal investigation/trial. A statement was made in the first counter affidavit that the work is under investigation in West Agartala P.S. case, the details of which were not furnished. However, in the additional affidavit filed thereafter, the respondents have made a categorical statement that after completion of investigation, involvement of this agency in the West Agartala P.S. case No.2019WAG251 dated 13.10.2019 is not established. No case is pending against the aforementioned agency. The averments made in the counter affidavit further indicate that reference for adjudication under the Clause-19(b) should be made within 6(six) months from the date of intimating the contractor of the preparation of final bill or his having accepted payment whichever is earlier. This averment has been strongly refuted by the petitioner in his rejoinder affidavit. At paragraph-8 of the rejoinder, petitioner states that the respondents have accepted that there are certain disputes between the parties which can only be settled by arbitration. Moreover, till date the respondents have not intimated the petitioner regarding preparation of final bill nor the said final payment has been made by the respondents. As such, final bills have not been accepted by the petitioner. Therefore, the objection raised by the respondents that the petitioner failed to comply with Clause-19(b) of the MOU is wrong and not tenable. Petitioner also contended that there is no criminal case pending against the petitioner. Petitioner has duly followed the process seeking reference of dispute to arbitration by following the Clause-18 and clause 19(b) of the MOU by submitting notices dated 27.06.2023, 08.08.2023 and 22.09.2023 before the respondents but the Chief Engineer failed to refer the matter for arbitration.

8. Learned counsel for the petitioner submits that, therefore, all the requirements for appointment of an independent arbitrator under Section 11(6)(a) of the Arbitration and Conciliation Act, 1996 (as amended) is made out on the basis of the arbitration Clause-19(b) of the MOU existing between the parties. Therefore, this Court may appoint an independent arbitrator.

9. I have considered the submissions of learned counsel for the parties and recorded a brief chronology of their respective cases on the germane issues that is existence of arbitration clause; existence of an arbitrable dispute and compliance of the process by the petitioner-contractor before approaching this Court under Section 11(6)(a) of the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator in terms of the arbitration clause. The narration of facts referred to above leads to the conclusion that the existence of an arbitration clause in the MOU which is treated as an agreement between the parties for execution of the enumerated works is not in dispute. Final bills have not yet been prepared. Therefore, question of acceptance of final bills by the petitioner also does not arise. The work was started in the year 2010 after approval of the DPR submitted by the petitioner in terms of the LOI and the MOU dated 07.01.2009. The execution of the work was finally concluded after 6(six) years on 19.03.2016. Respondents also issued a completion certificate on 15.12.2017 which are part of Annexure-15 series. If the final bills have not been prepared and moreover, security deposit of Rs.25 lakhs has not been released, there is no doubt that arbitrable dispute exists between the parties. However, certain claims of the petitioner relate to refund of excess VAT paid as against the running account payments made from time to time. This dispute ought not to be referred to the arbitrator as they relate to the domain of sovereign tax claims. Petitioner also has duly represented before the concerned authorities before invoking the arbitration clause to the competent authority, i.e. Chief Engineer vide his letter dated 22.09.2023 under Clause-19(b) of the MOU which remains unresponded. Clause 19 of the MOU is extracted hereunder for reference:

“19. 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 6(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.”

10. As such, this Court is satisfied that the petitioner has made out a case for appointment of an independent arbitrator. It is pertinent to state here that whether the dispute is alive or not or the merits of the dispute are not to be gone into by this Court while making reference to an arbitrator.

11. In such circumstances, this Court proposes to appoint Hon'ble Mr. Justice Virender Singh, former Chief Justice of Jharkhand High Court to act as an arbitrator between the parties.

The proposed arbitrator is requested to submit his declaration in terms of Section 12 read with Schedule VI of the Arbitration and Conciliation Act, 1996.

Let a copy of the instant order be communicated to the proposed arbitrator by the Registry.

It is made clear that petitioner is left with liberty to raise its claim for VAT dues in an appropriate proceeding in accordance with law.

Let the matter appear on **09.08.2024**."

4. Pursuant to the order dated 04.07.2024, this Court proposed to appoint Hon'ble Mr. Justice Virender Singh, former Chief Justice of Jharkhand High Court as an arbitrator. The proposed Arbitrator has submitted his consent along with a declaration under Schedule-VI of the Arbitration and Conciliation Act, 1996 as amended.

5. Learned counsel for the parties, therefore, submit that this Court may appoint him as an arbitrator to adjudicate the dispute between the parties.

6. In view of the consent and declaration submitted by the proposed Arbitrator, I, hereby, appoint Hon'ble Mr. Justice Virender Singh, former Chief Justice of Jharkhand High Court, as an Arbitrator to adjudicate the dispute between the parties. Learned Arbitrator is requested to take into consideration the Schedule of Model Fee prescribed under Schedule IV and the timeline prescribed under Section 29-A of the Arbitration and Conciliation Act, 1996 as amended.

7. Learned counsel for the parties have supplied the e-mail address and phone number of the respective parties. These are indicated hereunder for convenience of the learned Arbitrator in conducting the proceedings:

Petitioner:

e-mail i.d. : gbanerjee@royalconstruct.com

Phone no. : 9830579316

Respondent:

e-mail i.d. : pwdsantirbazardivision@gmail.com

Phone no. : 9436471083

8. Registry is directed to communicate the instant order along with a copy of the entire pleadings of the instant application to the Learned Arbitrator forthwith.

9. The instant petition stands allowed and disposed of.
Pending application(s), if any, shall also stand disposed of.

(APARESH KUMAR SINGH), CJ

Pulak

**SIDDHARTHA
LODH**

 Digitally signed by SIDDHARTHA
LODH
Date: 2024.08.14 16:47:24 +05'30'