GAHC040005732023

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)
(ITANAGAR BENCH)

Case No. : Arb.P./2/2023

M/s LSR Infracon Pvt. Ltd.
Having its Registered Office at Godrej Eternia, Plot No 70, 2nd Floor, Tower B, Industrial Area, Phase 1, Chandigarh 160002 Through its Authorised Representative Mr. OM Prakash. Mobile No. 7009269750

VERSUS

Border Roads Organization
Through its Chief Engineer, Project Arunank, Near Dam Site, C/o 99 APO, PIN 931719

Advocate for the Petitioner : Taja Garam

Advocate for the Respondent : Marto Kato

BEFORE
HONBLE MR. JUSTICE SUMAN SHYAM

ORDER

Date : 20/03/2024

1. Heard Ms. L. Sahani, learned counsel for the applicant, who has addressed this Court through RVC. Also heard Mr. M. Kato, learned DSGI, appearing for the respondents.

2. This is an application under section 11(6) of the Arbitration and Conciliation Act, 1996 (*herein after referred to as the Act of 1996)* filed by the contractor with a prayer to appoint a sole Arbitrator so as to enter into reference with regard to the contractual disputearising by and between the parties.

3. The facts and circumstances of the case, leading to the filing of this petition, briefly stated, as apparent from the materials on record, are that the respondent Border Road Organisation (BRO) had issued a Notice Inviting Tender (NIT) dated 16/12/2019 for execution of a contractual work at the estimated cost of Rs. 3669.49 lakhs. Pursuant thereto, the petitioner had submitted its bid and was eventually awarded the contract. A Contract Agreement was accordingly entered into by and between the parties on 15/02/2020. While executing the contractual work, the petitioner claims to have incurred certain additional expenditures due to escalation of price of raw materials on account of out break of COVID-19 pandemic. According to the petitioner, the excess amount incurred by it is to the tune of Rs. 10 crores. Therefore, the petitioner had raised its claim with the respondent by submitting letters dated 11/10/2021 and 08/11/2021. However, the claim of the petitioner was rejected by the respondents by letter dated 25/11/2021, thus giving rise to a dispute by and between the parties to the contract agreement. The petitioner had, therefore, invoked the arbitration clause in the contract agreement i.e. clause-70 and by letter dated 23/01/2022, demanded appointment of Arbitrator. However, no Arbitrator was appointed by the respondent. On the contrary, by reply dated 09/02/2023, the respondent has*inter alia* stated that the sole Arbitrator ought to be a serving Officer to be appointed by the authority mentioned in the tender document and unless both the parties agree in writing, reference cannot take place till completion of the work or termination or determination of the contract. Arbitrator cannot also be appointed without waiver under subjection 5 of section 12 of the Act of 1996.. Situated thus, the instant application has been filed by invoking the jurisdiction of this Court under section 11(6) of the Act of 1996 seeking appointment of Arbitrator.

4. During the course of argument, Ms. L Sahani, learned counsel for the applicant, has contended that since there is an arbitrable dispute by and between the parties and in view of clause-70 of the contract agreement, it was incumbent upon the respondents to appoint an Arbitrator, pursuant to the request made by the petitioner vide letter dated 23/01/2022. However, instead of doing so, the respondent, has set terms and conditions to be complied with by the petitioner vide letter dated 09/02/2023, which were not at all tenable in the eyes of law.

5. By referring to the decision of the Hon'ble Supreme Court of India rendered in the case of ***Data Switchgears Ltd. Vs. Tata Finance Ltd. and Another*** reported in ***(2000)***

8 SCC 151 as well as in the case of ***Union of India Vs. Parmar Construction Company*** reported in ***(2019) 15 SCC 682***, Ms. Sahani has argued that the respondent having failed to appoint an Arbitrator within 30 days of receipt of request or at-least prior to filing of this application, has forfeited its right, if any, under the contract agreement to appoint an Arbitrator. As such, an order be passed by this Court appointing an Arbitrator from the panel prepared by the Gauhati High Court and notified by notification no. 99 dated 04/08/2023 so as to enter into a reference with regard to the pending dispute.

6. Mr. M. Kato, learned DSGI, appearing for the respondents, has neither denied the existence of the arbitration agreement nor has he disputed the claim of the petitioner that there are some disputes and differences existing by and between the parties which require resolution by referring the same to an Arbitral Tribunal constituted by a sole Arbitrator. Mr. Kato also submits that his client would have no objection if an Arbitrator is appointed from the penal notified by the Registry of this Court bearing notification no. 99 dated 04/08/2023.

7. As noted above, the arbitration agreement is contained in clause 70 of the contract agreement dated 15/02/2020. Clause 70 is reproduced herein below for ready reference :-

"*70. Arbitration – All disputes, between the parties to the Contract (other than those for which the decision of the Commander Contract or any other person is by the Contract expressed to be final and binding) shall, after written notice by either party to the Contract to the other of them, be referred to the sole arbitration of an (serving Officer having degree in Engineering or equivalent or having passed final/direct final Examination of sub-Division II of Institution of Surveyor (India) recognized by the Government of India).*

8. From the above, it is clear that there is a binding arbitration agreement by and between the parties providing that any dispute arising within the ambit of contract agreement, would have to be referred for adjudication by an Arbitral Tribunal. However, the respondent has failed to appoint an Arbitrator till date as per the request made by letter dated 23/01/2022. Therefore, in view of the law laid down in the case of ***Parmar Construction Company (Supra)*** the respondent has forfeited its right to appoint an Arbitrator under clause 70 of the Agreement.

9. For the reasons stated above and in view of the consensus reached at the Bar that there are some disputes and differences by and between the parties which calls for resolution

by referring the same to an Arbitral Tribunal by appointing a sole Arbitrator from the penal notified by this Court on 04/08/2023, with the consent of both the sides, Mr. Justice (Retd) Deepak Gupta, (former judge of the Hon'ble Supreme Court) is hereby appointed to act as the Sole Arbitrator so as to enter into a reference in respect of the dispute between the parties.

10. Registry to obtain the consent of the learned sole Arbitrator and thereafter, transmit the records for further action in the matter.

11. With the above observation, this arbitration application stands disposed of.

There shall be no order as to costs.

JUDGE

Sukhamay

Comparing Assistant