

HIGH COURT OF CHHATTISGARH, BILASPUR**ARBA No. 78 of 2013**

Khurana Construction, a partnership firm, through its partner Mr. Shrikant Khurana, having its office and principal place of business at 701-702 Gunjan, Towers, Near Synergy House, Opposite Alembic Govra Road, Subhanpura, Vadodra, Gujrat

--- Petitioner

Versus

1. City Mall Developers Pvt Ltd., a Company registered under the Companies Act, 1956 its Chairman-cum-Managing Director, and having its registered office at A-7, Anupamnagar, Raipur (C.G).
2. Shilp Shree Project Management Consultant of Respondent No.1 having its office at 907, Span Trade Center, Opposite Kochrab Ashram Road, Ahemdabad (Gujarat)

--- Respondents

For Applicant	:	Shri Kshitij Sharma, Advocate.
For Respondent No1	:	Shri Shrikumar Agrawal, Sr.Advocate with Mr. Anand Gupta, Advocate

HON'BLE SHRI JUSTICE GOUTAM BHADURI

JUDGMENT/ORDER ON BOARD

01/09/2015

1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of Arbitrator.
2. According to the petitioner, respondent No.1 issued notice inviting tenders for the proposed Civil Work at City Mall Raipur through respondent No.2, Project Management Consultant (PMC). The tender of the petitioner was accepted. Consequently, the contract was signed by the parties specifying the terms contained in the contract. This fact is not in dispute that the terms of agreement contained an arbitration clause. The relevant Clause 44 of the agreement is quoted hereinbelow:

“Arbitration: Any dispute/ difference arising/ relating to or out of the contract between the employer and contractor shall be resolved through arbitration. It is clarify that certificate of PMC/Site Engineer with regard to work done shall be binding on the parties and shall not be questioned in the arbitration. Certificate issued by the PMC in respect of quality and quantum of work approved by Site Engineer shall be final and binding on the parties.

In case of disputes, the party concerned is required to bring to the notice of the Site Engineer in writing and if not resolved within 30 days from the date of notice, in that case only, the parties shall be at liberty to invoke arbitration clause by 15 days notice.

Such written notice shall specify the matters which are in dispute or difference of which such written notice has been given and no other shall be and is hereby referred to the arbitration and final decision of an arbitrator to be agreed upon and appointed by both the parties or, in case of disagreements as to the appointment of a single arbitrator, to the appointment of two arbitrators, one to be appointed by each party, which arbitrators shall, before taking upon themselves the burden or reference, appoint and Umpire. The venue for such arbitration shall be at Ahmedabad.”

3. It is the case of petitioner that after completion of the entire work, the final bill was raised by it by letter dated 15.11.2007 and the said letter was further approved by the Project Management Consultant but the bills were not finalized and payments were not made. Consequently, by a letter dated 17.11.2008 addressed to respondent No.1, it was requested to release the payment of final bill. However, the payment of bills having not been made as dispute arose between the parties, the arbitration clause was invoked by letter dated 24.6.2010 vide Annexure A-4 and the arbitrator having not been appointed, the instant petition is before this Court.
4. Learned counsel for the petitioner submits that according to arbitration clause, if any dispute arose out of the

contract between the petitioner and respondents it is to be resolved through the arbitrator. He further submits that after completion of the work the petitioner company sent the bills by letter dated 15.11.2007 and payment having not been made, the dispute automatically came to fore. Therefore, the dispute has to be resolved through arbitrator and the arbitrator may be appointed to resolve the dispute.

5. Per contra, learned counsel for respondent No.1 would submit that initially the final bill amounting to Rs.9,05,894/- was raised but subsequently by letter dated 17th Nov. 2008 which was endorsed by the Project Management Consultants an exorbitant amount of Rs.29,32,466=70 was raised. He submits that further according to agreement, the petitioner was required to bring to the notice of Site Engineer any dispute and in case if it had not been resolved within 30 days of notice, then only the arbitration clause should have been invoked. Consequently, he submits that the arbitrator cannot be appointed at this stage.
6. I have gone through the agreement. The agreement would show that the arbitration clause is in two parts. Initially it starts with the words "any dispute/difference arising/relating to or out of the contract between employer and the contractor shall be resolved through the Arbitrator". Further it purports that that the certificate with regard to the work done issued by the Project Management Consultant/Site Engineer shall be binding on the parties and shall not be questioned in arbitration. It therefore leads to point out that the certificate issued by

the PMC would not be questioned at any stage during arbitration. In a result, the certificate issued by the PMC/Site Engineer in respect of quality and quantum of work approved shall be final and binding on the parties.

7. A perusal of the record would show that initially by letter dated 15.11.2007 the bill amounting to Rs.9,05,848/- was raised by the petitioner along-with attached documents. Subsequently, the reminder was sent on 17th November, 2008 which finds a reference of a final bill submitted on 15.11.2007 and it speaks about the certificate issued by the PMC. The certificate issued by the PMC is also enclosed. It shows that the final bill amounting to Rs.29,32,446/- was forwarded. Therefore, certainly the dispute arose between the parties about the quantum of amount payable under the bill. Importantly the letter dated 24.6.2010 speaks about the invocation of the arbitration clause by the petitioner and in reply thereto, respondent No.1 has stated that they are ready to appoint arbitrator provided that unwanted dispute cannot be placed before the Arbitrator. So principally, respondent No.1 agreed to appoint arbitrator by its reply dated 28.06.2010 provided that unwanted dispute is not raised before the arbitrator. So the letter seeking appointment of arbitrator and reply to it clearly point out that a dispute has arisen between the parties. The documents filed would go to show that the work so done was certified by the Project Management Consultant (PMC). The said certificate filed along-with the bill is captioned as "Final Bill - Measurements". The said certificate contains the description of work done.

8. Perusal of return of respondent No.1 would show that it is stated that final bill was not submitted by the petitioner as such demand made for appointment of arbitrator was not entertained. It is stated by respondent that certificate from Site Engineer was not obtained along with the measurement and final bills were not submitted. The arbitration clause contemplates that dispute/ difference relating to contract between the parties shall be resolved through arbitration. It also contemplates that with respect to work done, Certificate of PMC/Site Engineer shall not be questioned in arbitration. It further says that the quantum and quality of work done if certified and approved by Site Engineer would be final. The agreement further says that in case of dispute, the party concerned shall bring it to the notice of Site Engineer and if it is not resolved within a period of 30 days, the party shall be at liberty to evoke arbitration clause.
9. The documents placed along-with the petition show that for the work done, certificate has already been issued. The letter dated 15.11.2007 purports that a final bill for Rs.9,05,894/- was submitted by the petitioner. Subsequent letter dated 17.11.2008 is on record wherein reminder was given to release the final bill. So, as appears from the pleading, the dispute primarily revolves around the quantum of bill.
10. Therefore, considering the letter for invocation of arbitration clause and the reply there of, it cannot be stated that no dispute had arisen between the parties. When the arbitration clause was invoked by the petitioner, in reply it was contended to raise the final bill as per the

terms of tender, therefore, even otherwise respondent No.1 acceded for appointment of Arbitrator. Even if it is presumed that final bills were not raised, in absence thereof, the respondent agreed for appointment of an arbitrator. Therefore, in the opinion of this Court, the dispute so far as it relates to quantum of bill in the facts of the case, can be adjudicated by the arbitrator. It is further observed that looking to the nature of controversy between the parties, respondent No.1 shall be free to raise his objection regarding quantum of bill and the quantity of work done during the arbitration proceedings. It will be open for respondent No.1 to raise the objection before the the Arbitrator for adjudication of dispute.

11. In view of the facts of the case, this Court is of the view that a dispute has arisen between the parties relating to contract which requires to be adjudicated by an arbitrator. Accordingly, Hon'ble Shri Justice Dharendra Mishra (Retired Judge of High Court of Chhattisgarh) is appointed as Sole Arbitrator to adjudicate the difference/dispute. The remuneration of the Arbitrator shall be settled by the parties.
12. With the above direction/observation, this petition stands disposed. No order as to cost.

Sd/-
GOUTAM BHADURI
JUDGE