

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

% *Judgment pronounced on: 27th January, 2016*

+ **ARB. P. No.373/2015**

CONCEPT INFRACON PVT. LTD Petitioner
Through: Mr.Balaji Subramaniam, Adv. with
Mr.Samar Bansal and Mr.Vinayak
Mehrotra, Advs.

versus

HIMALAYA CREST POWER LTD. Respondent
Through: Mr.Arun Arora, Adv. with
Ms.Preeti,Adv.

CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH

MANMOHAN SINGH, J.

1. The present arbitration petition has been filed under Section 11 of the Arbitration and Conciliation Act seeking appointment of a sole Arbitrator to resolve the disputes that have arisen between the petitioner and the respondent in relation to the Agreement signed between the parties in the year 2011 (hereinafter referred to as the "2011 agreement").

2. The 2011 Agreement was executed between the parties on 28th April, 2011 with the petitioner as the contractor and the respondent as the employer. The scope of the agreement was for the contractor to complete the balance civil work in the hydroelectric power project known as 'Timbi Hydroelectric Project' in Himachal Pradesh.

3. The petitioner's case is that it has not been paid for work done by it. The petitioner's obligation under the 2011 Agreement was to carry out 'balance civil work' at the project. This is because the initial part of the work had been executed by a different contractor under an agreement signed in 2005 (hereinafter referred to as the "2005 Agreement"). In the Letter of Acceptance dated 18th April, 2011 issued by the respondent to the petitioner, it was expressly provided that the "scope of work and terms and conditions shall be in accordance with our earlier Tender Call No.1396/Timbi/Civil/2005". Thus, all the terms and conditions of the 2005 Agreement were incorporated into the 2011 Agreement.

4. The relevant dispute resolution clauses in the 2011 Agreement (incorporated through the 2005 Agreement) are as follows :

Clause 1.1 para 1: The Adjudicator is the person appointed jointly by the Employer and the Contractor to resolve disputes in the first instance, as provided for in clauses 24 and 25. The name of the Adjudicator is defined in the Contract Data.

Clause 24: If the Contractor believes that a decision taken by the Engineer was either outside the authority given to the Engineer by the Contract or that the decision was wrongly taken, the decision shall be referred to the Adjudicator within 14 days of the notification of the Engineer's decision.

Clause 25.1: The Adjudicator shall give a decision in writing within 28 days of receipt of a notification of a dispute.

Clause 25.2: The Adjudicator shall be paid daily at the rate specified in the Contract Data together with reimbursable expenses of the types specified in the Contract Data and the cost shall be divided equally between the Employer and

the Contractor, whatever decision is reached by the Adjudicator. Either party may refer a decision of the Adjudicator to an Arbitrator within 28 days of the Adjudicator's written decision. If neither party refers the dispute to arbitration within the above 28 days, the Adjudicator's decision will be final and binding.

Clause 25.3: The arbitration shall be conducted in accordance with the arbitration procedure stated in the Special Conditions of Contract.

Clause 25.3(f) (Special Conditions of Contract): Where the value of the contract is Rs. 50 millions and below, the disputes or differences arising shall be referred to the Sole Arbitrator. The Sole Arbitrator should be appointed by agreement between the parties; failing such agreement, by the appointing authority, namely the Indian Council for Arbitration/ President of the Institution of Engineers (India)/The International Center for Alternative Dispute Resolution (India).

5. The procedure envisaged under the 2011 Agreement is that disputes are to be first referred to an Adjudicator and thereafter to be referred to arbitration. The value of the dispute in the present case is admittedly less than Rs. 5 crore and therefore, the matter is to be decided by a sole Arbitrator as provided in clause 25.3 (f). However, portion of the clause pertaining to the appointing authority is unenforceable since it mentions three separate institutions, namely the Indian Council of Arbitration, the President of the Institution of Engineers (India), and the International Centre for Alternative Dispute Resolution (India). These are three separate, independent and totally unconnected institutions and it is impossible to determine which one shall be the appointing authority. Hence, this application has been filed in this Court either for referring the matter to the Delhi

International Arbitration Centre established by this Court or to appoint sole Arbitrator by this Court.

6. Thereafter, as per the respondent the disputes arose between the parties as the petitioner abandoned the contract after completion of only 5% of the total work.

7. The petitioner by notice dated 19th May, 2007 claimed a sum of Rs.18,49,533/-. The respondent gave a notice of fundamental breaches of contract and levy of liquidated damages in the sum of Rs.29,28,990/- by notice dated 13th March, 2015.

8. On 11th March, 2015, the petitioner referred its disputes to Mr. G.S. Chandpuri for adjudication. As per Clauses 24 and 25 of the contract, the Adjudicator was required to submit a decision within 28 days. However, on 8th April, 2015, after a period of 28 days, Mr. Chandpuri replied while declining to adjudicate the matter. Therefore, it is submitted that the petitioner has complied with the pre-arbitral procedure laid down in the contract to the extent possible.

9. Thereafter, on 6th May, 2015 the petitioner issued the notice for Arbitration to the respondent. It also suggested the names of two persons vide notice dated 6th May, 2015 for the appointment of Arbitrator. However, the respondent did not reply to the said notice. Thereafter, the petitioner was constrained to approach this Court for appointment of a sole Arbitrator.

10. The respondent has opposed the petition by primarily contending that the reference would be premature since the matter has not been first dealt with by an adjudicator.

11. In the present contract between the parties, the name of Adjudicator was yet to be agreed to by and between the parties as the same was left in blank in contract data at page 7 of respondent's documents and the said name was to be filled in after the Adjudicator was appointed by mutual consent of the parties.

12. The Adjudicator jointly appointed by the parties is required to give decision in writing within 28 days of receipt of a notification of a dispute as per clause 25.1. The Adjudicator's decision would be final and binding on the parties unless either of the parties refer the decision of the Adjudicator to an Arbitrator within 28 days of the Adjudicator's written decision.

13. The dispute resolution machinery provides for Replacement of Adjudicator as under:-

“Should the Adjudicator resign or die or should the Employer of the Contractor agree that the Adjudicator is not fulfilling his function in accordance with the provisions of the Contract, a new Adjudicator will be jointly appointed by the Employer and the Contractor. In case of disagreement between the employer and the Contractor, within 30 days, the Adjudicator shall be designated by the Appointing Authority designated in the Contract Date at the request of either party, within 14 days of such request.”

In view of the clause 25.2 of the contract, a written decision of the Adjudicator is a mandatory condition precedent to reference of dispute to sole Arbitrator designated by the Appointing Authorities mentioned in clause 4 of Conditions of Contract i.e. Indian Council of Arbitration or President of Institution of Engineers (India) or the International Centre for Alternative Disputes Resolution.

14. In the present case, the petitioner and the respondent did not jointly designated any person to act as Adjudicator for resolution of disputes between the parties as the petitioner never approached the respondent for appointment of an Adjudicator with mutual consent. The petitioner, no doubt, unilaterally approached Mr.G.S. Chandpuri, with reference to Agreement No.1397/Timbi/balance main works/2011 dated 28th April, 2011 clearly mentioning that the agreement was between the petitioner and respondent.

15. There is a force in the submission of the counsel for the respondent that Mr.Chandpuri is a stranger to the contract between the petitioner and the respondent. Mr.Chandpuri was nominated as Adjudicator by the respondent and one erstwhile contractor namely, M/s Srinivasa Constructions Limited Hyderabad in the year 2005. Mr.Chandpuri could not have been aware of the petitioner in any manner as Mr.Chandpuri's name was not mentioned in the contract executed between the petitioner and the respondent in the year 2011 and the petitioner wrongfully approached Mr.Chandpuri vide its letter dated 11th March, 2015 for getting his consent to act as an Adjudicator for resolution of dispute between the parties.

It is the admitted position that in response to the petitioner, Mr.Chandpuri rightly informed the petitioner by his handwritten letter dated 8th April, 2015 that Mr.Chandpuri was not aware about the contract and did not know anything about the matter.

16. Thus, Mr.Chandpuri was not jointly appointed by the petitioner and the respondent. The parties need to jointly appoint an Adjudicator in terms of clause 1.1 of the Conditions of Contract

between the parties as stated herein above. The petitioner did not contact the respondent for jointly nominating a person as Adjudicator for resolution of dispute.

17. Clause 26 of the Conditions of Contract provides that in case of disagreement between the parties the nominated institutions can be approached for designating a person as Adjudicator who would give his written decision in 28 days. The decision by an Adjudicator cannot be considered as merely directory because the parties have consciously adopted this particular mode of resolution of disputes between the parties by a written contract and the procedure of resolution of the dispute between the parties through Adjudicator has not yet been exhausted in terms of the contract.

18. In the case of ***Municipal Corporation Jabalpur v. Rajesh Construction***, 2007 (2) Arb.LR 65 (SC), the Supreme Court after considering the disputes resolution machinery provided for by agreement between the parties and Section 11(6) (c) that where a person, including an institution, fails to perform any function entrusted to him or it under that procedure, 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 and held as under :-

“24. That apart, it has to be kept in mind that it is always the duty of the court to construe the arbitration agreement in a manner so as to uphold the same. Therefore we must hold that the High Court ought not to have appointed an arbitrator in a manner, which was inconsistent with the arbitration agreement.”

19. In the case of ***Indian Iron and Steel Co. Ltd. v. Tiwari Road Lines*** 2007 (2) Arb.LR 270 (SC) it was held as under:-

“8. In the present case the agreement executed between the parties contains an arbitration clause and clause 13.1 clearly provides that all disputes and differences whatsoever arising between the parties out of or relating to the construction, meaning and operation or effect of the contract or the breach thereof shall be settled by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration and the award made in pursuance thereof shall be binding on the parties. This clause is in accordance with sub-section (2) of Section 11 of the Act. There being an agreed procedure for resolution of disputes by arbitration in accordance with the Rules of Arbitration of the Indian Council of Arbitration sub-sections (3), (4) and (5) of Section 11 can have no application. The stage for invoking sub-section (6) of Section 11 had also not arrived. In these circumstances, the application moved by the respondent before the City Civil Court, Hyderabad, which was a designated authority in accordance with the scheme framed by the Chief Justice of the Andhra Pradesh High Court, was not maintainable at all and the City Civil Court had no jurisdiction or authority to appoint an arbitrator. Thus the order dated 31-3-2004 passed by the Chief Judge, City Civil Courts, Hyderabad, appointing a retired judicial officer as arbitrator is clearly without jurisdiction and has to be set aside.

9. The legislative scheme of Section 11 is very clear. If the parties have agreed on a procedure for appointing the arbitrator or arbitrators as contemplated by sub-section (2) thereof, then the dispute between the parties has to be decided in accordance with the said procedure and recourse to the Chief Justice or his designate cannot be taken straightaway. A party can approach the Chief Justice or his designate only if the parties have not agreed on a procedure for appointing the arbitrator as contemplated by sub-section (2) of Section 11 of the Act or the various contingencies provided for in sub-section

(6) have arisen. Since the parties here had agreed on a procedure for appointing an arbitrator for settling the dispute by arbitration as contemplated by sub-section (2) and there is no allegation that any one of the contingencies enumerated in clause (a) or (b) or (c) of sub-section (6) had arisen, the application moved by the respondent herein to the City Civil Court, Hyderabad, was clearly not maintainable and the said court had no jurisdiction to entertain such an application and pass any order.”

20. Even as per amended Sub-Section 6(A) of Section 11, the Court while considering any application, shall confine to examination of the existence of an arbitration agreement. The present petition filed by the petitioner for appointment of a sole Arbitrator is not maintainable in view of the mandatory clauses of the Dispute Resolution Machinery agreed to by and between the parties whereunder a written decision by an Adjudicator jointly nominated by the parties or designated by the appointing authority such as President of Institution of Engineers (India) is a condition precedent to arbitration proceedings and it is a written decision of the Adjudicator which is binding and final between the parties unless one of the parties dissatisfied with the written decision refers the said written decision of the Adjudicator for arbitration in term of clause 25.2 of the Conditions of Contract.

21. In view of the above settled law and facts in the present case, the respondent has valid force in its submissions. The notice issued by the petitioner to invoke arbitration is not issued as per the terms of the contract. However, counsel for the respondent has fairly agreed that as in another matter, this Court in Arb.P. No.324/2010 had requested the Director of IIT, Delhi to nominate a suitable adjudicator

in terms of agreement, the respondent has no objection if similar order is passed.

22. The petition is accordingly disposed of with the request to the Director of IIT, Delhi to nominate a suitable adjudicator.

23. No costs.

(MANMOHAN SINGH)
JUDGE

JANUARY 27, 2016