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IN THE HIGH COURT OF DELHI AT NEW DELHI

ARB.P. 535/2015

ARORA CONSTRUCTION CO. PRIVATE LTD. ..... Petitioner
Through: Ms. Priya Kumar, Advocate.

versus

DELHI STATE INDUSTRIAL AND INFRASTRUCTURE DEVELOPMENT CORPORATION LTD. ..... Respondent
Through: Mr. Mori Cinnoy, Advocate.

CORAM: JUSTICE S. MURALIDHAR

<u>O R D E R</u>

% **27.10.2016**

1. This is a petition filed by the Arora Construction Co. Private Ltd. under Section 11 of the Arbitration & Conciliation Act, 1996 (Act) seeking the appointment of an arbitrator.

2. There are various objections raised by the Respondent Delhi State Industrial and Infrastructure Development Corporation Ltd. ('DSIDC') against the present petition. The first objection is that along with the present petition the Petitioner has filed in the documents an undertaking dated 23rd December 2014, which is different from the undertaking given by the Petitioner which is dated 24th December, 2014.

3. In order to appreciate the above objection, reference has been made to few facts leading to filing of the present petition. The Petitioner was awarded the

contract of construction of Electronic Cum Software Marketing Estate Complex at Okhla Phase-II, New Delhi pursuant to tender floated by DSIDC. As part of the acceptance of the tender the Petitioner was to submit a performance guarantee (PG) in the sum of Rs.55.85 lakhs within 14 days and also give an earnest deposit. For various reasons the work could not progress. The parties then decided to bring the contract to a close. A letter was written by DSIDC on 22nd December, 2014 to the Petitioner in which it was stated that the request made by the Petitioner for the closure of the contract, return of the PG and the earnest money deposit (EMD) and payment of the final bill, has been approved "in principle" since DSIDC could not provide the approved building drawings in time.

4. What happened next is the subject matter of the above objection. According to the petitioner an undertaking was given by the petitioner to DSIIDC on 23rd December, 2014 in which it was stated as under :

> "We thankfully acknowledge the receipt of your letter No. DSIIDC/EE(RGP-II/MMH)/2014-15/593 dated 22.12.2014 wherein DSIIDC has agreed in principle to our request which are :
>
> 1. Return of Performance Guarantee & Earnest Money.
> 2. Closure of Contract.
> 3. Payment of Final Bill.
>
> As discussed yesterday the Performance Guarantee will be released on 24th December, 2014 and the Earnest Money will be released within one week. The process for payment of Final Bill will be started immediately and is likely to be paid by the end of January, 2015.
>
> As the DSIIDC has agreed to the above, we undertake as follows:

a) We will not raise any further claim on account of interest, loss of profit or damages etc. under any clause of the contract in any forum whatsoever and this mutual settlement shall be in full and final settlement of all claims in all respects under this agreement.
b) We will not invoke any arbitration clause.
c) We will not drag the corporation in any sort of litigation.

You are once again requested to release our Performance Bank Guarantee, Earnest Money & Final Bill payment as stated above."

5. Whereas according to DSIIDC the undertaking given by the petitioner was dated 24th December, 2015. The relevant portion which reads as under :

> "We thankfully acknowledge the receipt of your letter No. DSIIDC/EE (RGP-11/MMH)/2014-15/593 dated 22.12.2014 wherein DSIIDC has agreed in principle to our request which are:-
>
> 1. Return of Performance Guarantee & Earnest Money.
> 2. Closure of Contract
> 3. Payment of Final Bill.
>
> As the DSIIDC has agreed to the above, we undertake as follows:
>
> a) We will not raise any further claim on account of interest, loss of profit or damages etc. under any clause of the contract in any forum whatsoever and this mutual settlement shall be in full and final settlement of all claims in all respect under this agreement.
> b) We will not invoke any arbitration clause.
> c) We will not drag the corporation in any sort of litigation.
>
> You are once again requested to please our Performance Bank Guarantee, Earnest Money & Final Bill payment as stated above."

6. A comparison of both the above undertakings would show that the difference in the second undertaking is regarding the time lines for the

payment of the final bill and return of the PG and EMD. However, what is similar to both undertakings is that DSIIDC accepted the Petitioner's request for return of the PG, the EMD and payment of final bill. In other words, even if one were to go by the second undertaking, there was an express understanding that the above requests of Petitioner had been accepted by the Respondent.

7. The distinction between the two undertakings is not significant. On the other hand both undertakings are similar in the essential particulars. In the circumstances, the failure by the Petitioner to produce undertaking dated 24th December, 2014 cannot be said to have caused any serious prejudice to the case of the Respondent. In any event, for the purpose of present petition, the Court proposes to examine only the undertaking given by the Petitioner to DSIIDC on 24th December 2014, which has been enclosed as Annexure R2 to the reply filed by DSIIDC. This should therefore take care of the first objection raised by the Respondent.

8. It is next contended by the learned counsel for the Respondent that the final bill submitted by the Petitioner is not in a proper form and therefore till such time the final bill is submitted in a proper form the question of the Respondent releasing the amount towards the final bill would not arise.

9. Counsel for the Petitioner submits that the final bill is in the correct form and that DSIIDC is not justified in declining to process the final bill for payment. to continue to make full payment. This certainly would be an arbitrable dispute arising out of the contract.

10. The principal objection is that the Petitioner has already given up any further claims it may have against the DSIIDC as a result of the above undertaking. While it could be said that by giving the above undertaking, the Petitioner agreed not to raise any further claim on account of interest, loss of profit or damages and not to invoke the arbitration clause, this was in the express understanding that the Petitioner's final bill would be paid. To that extent it cannot be said that the undertaking was unconditional.

11. With the final bill not having been paid till date, the Petitioner cannot be estopped from invoking the arbitration clause.

12. The other issue raised by the learned counsel for the Respondent is on the ground of limitation. However, it is seen that prima facie it cannot be stated that the claim made by the Petitioner as regards the final bill is barred by limitation. In any event, this aspect can certainly be raised by the Respondent before the Arbitrator who will deal with it in accordance with law.

13. The third objection is that the proper procedure had not been followed for invoking the arbitration clause. It is contended that the Petitioner should have first written to the Executive Engineer (EE) and the Superintending Engineer (SE) before writing to the Chief Engineer (CE). The court finds that the letter written to the CE was also copied to the EE and the SE. Both of them were therefore aware of the request and had sufficient time to react to it. Consequently, this objection is rejected.

14. Whether any of the claims of the Petitioner is beyond limitation and

whether they are tenable on merits is for the Arbitrator to decide.

15. The Court accordingly appoints Mr. T R Nawal, former Additional District Judge (Mobile No: 9910384662) as the sole Arbitrator to adjudicate the disputes between the parties, including their claims and counter-claims. The arbitration will take place under the aegis of the Delhi International Arbitration Centre (DAC) and the fees of the learned Arbitrator will be in terms of the Delhi High Court Arbitration Centre (Administrative Costs and Arbitrators' Fees) Rules.

16. The petition is disposed of. A copy of this order be communicated to the learned Arbitrator and the Additional Co-ordinator DAC forthwith.

S. MURALIDHAR, J.

OCTOBER 27, 2016
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