

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

% **Order delivered on: 9th August,, 2016**

+ **Arb.P. No.636/2015**

M/s. Mega Engineering & Geo Technical Services Petitioner
Through Ms.Sushma Goyal, Adv. with
Ms.Anju Bharti, Adv.

versus

M/S Ksk Dinchang Power Company Pvt. Ltd. Respondent
Through Mr.Samrat K. Nigam, Adv. with
Ms.Bina Gupta & Mr.Abhay Anand
Jena, Adv.

**CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH**

MANMOHAN SINGH, J.

1. The petitioner has filed the present petition under Section 11 of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as the "Act").
2. The brief facts of the case are that on 12th January, 2012 work order was awarded to the petitioner by the respondent. On 15th February, 2013 last and final bill worth Rs.41,51,694/- was produced by the petitioner to the respondent. On 6th September, 2013 the respondent admitted the payment of bills amounting to Rs.18,00,000/- through e-mail. On 28th January, 2015 the respondent sent a notice to the petitioner for appointment of an Arbitrator.
3. It was agreed between both the parties as per the clause No. 11 of the Work Order that if any dispute arises out of the contract it shall be resolved mutually. In the present case, admittedly inspite

of requests of the petitioner, the respondent did not take any steps to resolve the dispute amicably with mutual consent. The offer made by the respondent in its e-mail for lesser amount was not acceptable to the petitioner. Thus, the present petition was filed.

4. Further, as per the clause No. 11 if the dispute is not resolved mutually, it will be referred to Arbitration as per the Act.

5. It is the case of the petitioner that since the respondent had breached the work agreement, the petitioner in exercise of its right under clause 11 had sent demand/legal notice dated 28th January, 2015 calling upon the respondent to pay the complete outstanding dues of Rs. 41,51,694/- including service tax with interest at the rate of 24% per annum as soon as possible along with the compensation of Rs. 2,00,000/- on account of lot of pain, harassment, mental agony, physical harassment, loss of precious time, loss of money spent and discomfort within 15 days from the date and time of receipt of demand cum legal notice failing which petitioner would be constrained to initiate appropriate application to this Court for the appointment of an Arbitrator under relevant provisions of law.

6. The said notice was duly served upon the respondent but in spite of giving specific reply of the notice, the respondent sent e-mails to the petitioner for settlement but the same could not be received. Besides the respondent also failed to resolve the matter through arbitration as it did not come forward to appoint any Arbitrator.

7. Even no steps were taken by the respondent to appoint the Arbitrator as per clause 11 of the work order before filing the present petition.

8. It is submitted by the respondent that this Court is not having jurisdiction as no part of cause of action has arisen within its territorial limits attracting the jurisdiction of this Court. Further, neither the petitioner's office nor the respondent's office is situated at Delhi nor the contract/work order was executed by the parties at Delhi nor the implementation or execution of the work under the alleged work order/contract is to be within the Jurisdiction of Delhi, hence, this Court does not have territorial jurisdiction to entertain this petition.

9. There is a specific clause (in the said work order-cum-contract) relating to the Arbitration, the same has been reproduced here as under:

"Dispute(s), if any, arising out of the contract shall be resolved mutually and the decision of KSK shall be binding on you. However, in case the dispute(s) are not resolved mutually. The same shall be referred to Arbitration as per Indian Arbitration & Reconciliation Act 1996. Arbitrator shall be appointed from the panel of the Arbitrators of any public sector Undertaking/Indian Arbitration council Decision of the Arbitrator shall be final and binding on both the parties Delhi Courts shall have the jurisdiction in all such matters."

10. It is stated by the petitioner that the proposal of Delhi Court jurisdiction was made by the respondent on his letter head and accepted by the petitioner. It is further submitted that the said contract was mutually agreed and after understanding the contents of the same, both the parties had signed the said work order-cum-contract. It is further submitted that the said work-order-cum contract is governed by the provisions of Indian Contract Act, 1872, which becomes enforceable under the law as defined in Sections 2 (h), 10,11,12,& 13 of the Indian Contract Act, 1872.

11. The basic principle of the contract is also present in the present case i.e. *consensus ad idem* which means meeting of minds.

12. While executing the work order-cum-contract in question, the respondent proposed and convinced the petitioner for Delhi Courts jurisdiction by disclosing the following facts to the petitioner:

- a) Central Electricity Authority would monitor the progress of the construction of the power project through frequent site visits and interaction with the developers and equipment suppliers.
- b) Regular views would be undertaken by Ministry of Power, Ministry of Heavy Industries and Cabinet Secretariat situated at Delhi, to identify the critical areas and facilitate faster resolution of inter-ministerial and outstanding issues.
- c) Ministry of Power would also review the progress of ongoing projects regularly with the equipment manufacturers, State Utilities/CPSUs/ Project developers etc. and after knowing all above mentioned facts, the petitioner also agreed for Delhi court jurisdiction because the project work was under the supervision of Govt. of India at Delhi.

13. Therefore, it is rightly submitted on the behalf of the petitioner that the intentions of both the parties to the said contract are clear and unambiguous by mentioning the clause 11 of the said contract for resolving their any dispute(s) either mutually or by appointing an Arbitrator under the Act and for this purpose, jurisdiction was fixed and vested in Delhi courts.

14. The cases relied upon by the respondent do not apply to the present case in view of specific arbitration clause.

15. It is settled law that if the contract is not against the public policy and not opposed to the Section 28 of the Indian Contract Act 1872, exclusive jurisdiction clause in the commercial contract can be accepted or can be agreed by the parties to the contract with mutual consent, which follows the maxim *consensus ad idem*. Therefore, this Court has the jurisdiction to entertain and decide the present petition.

16. The prayer made in the present petition is allowed. Accordingly, Justice B.A. Khan, Former Chief Justice of Jammu & Kashmir High Court (Mobile No.9818000150) is appointed as sole Arbitrator to adjudicate the disputes arising out of the agreement.

17. The Arbitrator shall ensure the compliance of the provisions of Arbitration and Conciliation (Amendment) Act, 2015 before commencing the arbitration. The fees of the learned Arbitrator shall be in terms of the schedule of the amended Act. The parties to appear before the learned Arbitrator on 7th September, 2016 at 5:30 pm for directions.

18. The petition is accordingly disposed of.

19. Copy of this order be given *dasti* to the learned counsel for the parties and a copy thereof be delivered to the learned Arbitrator forthwith.

(MANMOHAN SINGH)
JUDGE

AUGUST 09, 2016