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

+ **ARB.P. 137/2016**

VED PRAKASH MITHAL & SONS Petitioner

Through: Mr Peeyoosh Kalra, Advocate.

versus

DELHI DEVELOPMENT AUTHORITY & ORS. Respondents

Through: Mr Karan Sharma, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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06.01.2017

1. The petitioner has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereafter 'the Act'), *inter alia*, praying that an Arbitrator be appointed to adjudicate the disputes between the parties.
2. The petitioner had bid for the development work of 157.83 hectares of land in Sector 29 & 30 (Pt.) Rohini, Phase-IV & V, pursuant to tenders invited by the respondent no.1. The petitioner's bid was accepted and the parties entered into an agreement dated 22.06.2012. It is stated that certain disputes have arisen in relation to the said agreement.
3. The said agreement includes an arbitration clause, the relevant extract of which is set out below:-

"CLAUSE 25

Settlement of Disputes & Arbitration

(A) Except where otherwise provided in the contract all question

and dispute relating to the meaning of the specifications, design, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claims right, matter or thing whatsoever in any way arising out of relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mention hereinafter.

- (i) If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the Engineer-in-Charge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Superintending Engineer in writing for written instruction or decision. Thereupon the Superintending engineer shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter.

If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer, the contractor may, within 15 days of the receipt of Superintending Engineer's decision appeal to the Chief Engineer who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The chief Engineer shall give his decision within 30 days of receipt of the Contractor's Appeal. If the contractor is dissatisfied with this decision, the contractor shall within a period of 30 days from receipt of the decision, give notice to the Engineer Member for appointment of Arbitrator, failing which, the said decision shall be final, binding and conclusive and not referable to adjudication by the Arbitrator.

- (ii) Except where the decision has become final, binding and

conclusive in terms of Sub Para (i) above disputes or difference shall be referred for adjudication through arbitration by a Sole Arbitrator who shall be a technical person having the knowledge and experience of the trade, appointed by the Engineer Member, DDA. It will be no objection to any such appointment that the arbitrator so appointed is a employee that he had to deal with the matter to which the contract relates and that in the course of his duties as DDA employee, he, has expressed his views in all or any of the matter in dispute of difference. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever, another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute alongwith the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.

It is also a term of this contract that no person other than a person appointed by the Engineer Member, DDA, as aforesaid, should act as arbitrator and, if for any reason that is not possible; the matter shall not be referred to arbitration at all. It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-Charge that the final bill is ready for the payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the DDA shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modification or re-enactment thereof and the rules made there under and for the time being

in force shall apply to the arbitration proceeding under this clause.

It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and, in all cases, where the total amount of the claims by any party exceeds Rs.1,00,000/- the arbitrator shall give reasons for the award.

It is also a terms of the contract that if any fees are payable to the arbitrator, these shall be paid equally by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues the notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required, to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fee, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid.”

4. According to the petitioner, the works were completed on 11.10.2013, however, the amounts payable to the petitioner were not paid. Accordingly, the petitioner sent a letter dated 05.03.2015 addressed to the Executive Engineer requesting that the payments be made as early as possible. Since no response to the same was received, the petitioner sent another letter dated 21.03.2015 addressed to the Superintending Engineer with a similar request. This was, thereafter, followed by another letter dated 22.04.2015 addressed to the Executive Engineer, Superintending Engineer as well as the Chief Engineer. However, it is stated that the petitioner did not receive any

response to the said letters as well. Thereafter, the petitioner was constrained to issue a letter to the Engineer Member on 01.06.2015 requesting that an Arbitrator be appointed to adjudicate the disputes between the parties. This was once again followed by another letter dated 10.08.2015. As no response was received to these letters as well, the petitioner was constrained to file the present petition on or around 19.02.2016.

5. In the reply filed by the respondents to the present petition, the respondents had sought to oppose the present petition principally on the ground that the claims made by the petitioner were unmerited. It is relevant to note that the existence of the agreement or the arbitration clause is not disputed.

6. On 05.09.2016, the learned counsel for the respondents stated that during the pendency of the present proceedings the petitioner had accepted a sum of ₹87,30,871/- in full and final settlement of its claims. The learned counsel for the petitioner did not dispute that the petitioner had received the aforesaid sum or had signed a no claim certificate. He, however, stated that the said certificate was signed - even though the petitioner was not agreeable to receive the amount as full and final settlement of its dues - under economic duress. He further stated that the petitioner had, immediately, thereafter, sent a letter resiling from the said statement.

7. Although, the learned counsel for the DDA had sought time to file the relevant documents on record, however, four months have passed now and the said documents have not been placed on record.

8. By virtue of Section 11(6A) of the Act as introduced by the Arbitration and Conciliation (Amendment) Act, 2015, the examination is

now confined to the existence of the arbitration clause; which in this case is not disputed. The question whether the petitioner had received the amount of ₹87,30,871/- as full and final settlement of its dues appears to be a contentious issue and would be required to be decided by the Arbitrator.

9. In view of the aforesaid, it is directed that an Arbitrator be appointed under the Rules of Delhi International Arbitration Centre (DIAC). The parties shall appear before the Co-ordinator, DIAC on 24.01.2017 at 11:00 AM. The arbitration shall be conducted under the aegis of DIAC and in accordance with its Rules.

10. It is open for the respondents to persuade the Arbitrator to hear the question of discharge of the agreement by virtue of execution of the full and final settlement certificate, in the first instance. Needless to mention that if the said request is made, the same would be considered sympathetically by the Arbitrator.

11. The petition is disposed of.

12. Order *dasti*.

VIBHU BAKHRU, J

JANUARY 06, 2017

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