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

+ ARB.P. 245/2017

KMB-ERA JV.

..... Petitioner

Through: Mr Nilana Bandopadhyay, Advocate.

versus

AIRPORT AUTHORITY OF INDIA

..... Respondent

Through: Mr Digvijay Rai and Mr Vivek
Kumar Pandey, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

% **17.05.2017**

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 that have arisen between the parties in relation to an agreement dated 27.02.2008. The said agreement includes an arbitration clause which is set out below:-

"57. **Dispute Redressal Mechanism** :

a) (i) if a dispute of any kind, whatsoever, arises between the procuring entity and contractor in connection with or arising out of the contract or the execution of the works, whether during the execution of the works or after their completion and whether before or after the repudiation or termination of the contract including any disagreement by either party with any action, in action, opinion, instruction, determination, certificate or valuation of the Engineer, the matter in dispute shall, in the first place be referred to the Dispute Resolution Board as appointed by accepting authority as mentioned at S.No. 4 in Schedule-E.

(ii) if the contractor do/does not make any demand for

dispute resolution Board in respect of any claim in within 90 days of receiving the intimation from the AAI that the bill is ready for payment of the claim of the contractor(s) ill be deemed to have been waived and absolutely barred and the AAI shall be discharged and released of liabilities under the contract in respect of these claims.

(b) When the dispute could not be resolved through the Dispute Resolution Board, the Arbitration clause may be invoked.

Arbitration

(c) Except where otherwise provided for in the contract all questions and disputes relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or 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 completion or abandonment thereof shall be referred to the sole arbitrator as may be appointed by the authority mentioned at Serial no.31 at Schedule E. There will be no objection if the arbitrator so appointed is an employee of AAI and that he had to deal with the matters to which the contract relates and that in the course of his duties as such he had expressed views on all or any of the matters in dispute or difference. The arbitrator to whom the matter is originally referred being transferred or vacating his office or being unable to act for any reason, the appointing authority for the arbitrator as aforesaid at the time of such transfer, vacation of office or inability to act, shall appoint another person to act as arbitrator in accordance with the terms of the contract. Such person shall be entitled to proceed with the reference from the stage at which it was left by his

predecessor. It is also a term of this contract that no person other than a person appointed by the authority mentioned in Schedule E, should act as arbitrator and if for any reason, that is not possible, the matter is not to be referred to arbitration at all.

Cases where the amount of the claim in dispute is Rs. 75,000 and above, the arbitrator shall give reasons for the award.

Subject as aforesaid the provisions of the Arbitration Act, 1996, or any statutory modification or re-enactment therein and the rules made there under and for the time being in force shall apply to the arbitration proceeding under this clause.

It is a term of the contract that the party invoking arbitration shall specify the dispute or disputes to be referred to arbitration under this clause together with the amount or amounts claimed in respect of the dispute.

If the contractor do/does not make any demand for arbitration in respect of any claim in writing within 90 days of receiving the intimation from the AAI that the bill is ready for payment, the claim of the contractor(s) will be deemed to have been waived and absolutely barred and the AAI shall be discharged and released of liabilities under the contract in respect of these claims.

The decision of the Engineer-in-charge regarding the quantum of reduction as well as justification thereof in respect of rates for sub standard work which may be decided to be accepted will be final and would not be open to arbitration. The arbitrator(s) may from time to time with consent of the parties enlarge the time, for making and publishing the award.

The work under the Contract shall, if reasonably possible, continue during the arbitration proceedings and no payment due or payable to the Contractor shall be withheld

on account of such proceedings.

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties fixing the date of the first hearing.

The Arbitrator shall give a separate award in respect of each dispute or difference referred to him.

The venue of arbitration shall be such place as may be fixed by the Arbitrator in his sole discretion. The award of the arbitrator shall be final, conclusive and binding all parties to this contract."

2. The learned counsel for the respondent does not dispute the existence of the arbitration clause. He has opposed the present petition essentially on two grounds. First, he submitted that the present petition is barred by limitation as the works were completed on 31.12.2010 and the present petition has been filed belatedly. Second, he submits that the dispute resolution mechanism agreed between the parties provides for timelines and the requests for referring the disputes to the Disputes Resolution Board and appointment of an arbitrator is beyond the period as specified in the dispute resolution clause - clause 57 of the GCC.

3. The learned counsel for the petitioner has referred to a letter dated 02.12.2013, which indicates that although the works were completed by 31.12.2010, however, the petitioner's final bill had not been processed till that date (02.12.2013). He also referred to the reply filed by the respondent to the present petition, which indicates that the final bill was accepted on 29.04.2014. He stated that the petitioner had requested that the disputes be referred to the Dispute Resolution Board by its letter dated 08.02.2016.

4. The abovementioned letter seeking reference of the disputes to the Dispute resolution Board was within the period of three years of the acceptance of the final bill but was beyond the period of 90 days as mentioned in clause 57 of the GCC. The request for appointment of an arbitrator was also made within the period of three years from the date of acceptance of the final bill, however, it was beyond the period of 90 days provided for making the request for referring the disputes to arbitration.

5. The question whether the period of limitation for referring the disputes to arbitration could be curtailed to a period less than as specified under the Limitation Act, 1963 has been considered by this court in various decisions.

6. The Division Bench of this Court in the case of ***Chander Kant & Co. v. The Vice Chairman, DDA& Others: MANU/DE/2221/2009*** had rejected the contention that a demand for arbitration beyond the specified period would result in forfeiture of a party's right to refer the disputes to arbitration. A similar view was also taken by this Court in ***Hindustan Construction Corporation v. Delhi Development Authority: 77 (1999) DLT 165***; and, ***Pandit Construction Company v. Delhi Development Authority: 2007 (3) Arb. LR. 205 (Del)***.

7. Following the aforesaid decisions, this Court in the case of ***KMB - Era (JV) v. Airport Authority of India: Arb.P.620/2016, decided on 14.12.2016*** had appointed an arbitrator. In a recent decision in the case of ***B.L. Kashyap & Sons Ltd. v. Airport Authority of India: Arb.P. 360/2016, decided on 06.10.2016***, a Coordinate Bench of this court has also followed the earlier decisions and appointed an arbitrator although the request for

appointment of an arbitrator was made beyond the period as specified under the agreement.

8. The learned counsel for the respondent has pointed out that the aforesaid two decisions are pending consideration before the Supreme Court. However, no stay order has been passed in those cases. In view of the aforesaid, it was suggested that the present petition be deferred. However, this was opposed by the learned counsel for the petitioner. He insisted that in view of the provisions of Section 11(13) of the Act, the present petition ought to be disposed of.

9. In view of the above, an arbitrator is required to be appointed. At this stage, the learned counsel for the respondent, without prejudice to the rights and contentions, suggested that the matter be referred to Delhi International Arbitration Centre (DIAC). The learned counsel for the petitioner concurred with the said suggestion.

10. Accordingly, Justice Anil Dave, (Retired) a former judge of the Supreme Court is appointed as the sole arbitrator to adjudicate the disputes between the parties. This is subject to the arbitrator making the necessary disclosure under section 12 of the Act and not being ineligible under section 12(5) of the Act. The arbitration shall be conducted under the aegis of DIAC and in accordance with its Rules. The representatives of the parties shall appear before the Co-ordinator, DIAC 30.05.2017 at 11:00 p.m.

11. The petition is disposed of.

VIBHU BAKHRU, J

MAY 17, 2017
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