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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ARB.P. 801/2016

M/S. ESS ESS CONSTRUCTIONS

..... Petitioner

Through: Mr. Sandeep Sharma with Ms. Risha Mittal, Advocates.

versus

UNION OF INDIA

..... Respondent

Through: Mr. Praveen Kumar Jain with Mr. Naveen Kumar Jain, Advocates.

CORAM: JUSTICE S.MURALIDHAR

ORDER

02.02.2017

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IA No.1362/2017 (Exemption)

1. Allowed subject to just exceptions.

Arb. P. No.801/2016

2. This is a petition under Section 11 (6) of the Arbitration and Conciliation Act, 1996 ('Act') seeking the appointment of a sole Arbitrator in the disputes between the Petitioner, M/s. Ess Ess Constructions, and the Respondent, Central Public Works Department ('CPWD') arising out of the Contract entered into between them whereby the Respondent invited tenders for the work of "attending day-to-day complaint, internal wall finishing work i/c cleaning of water storage tank and other miscellaneous repair works in GPRA flats, ICAR flats, Custom & Central Excise Flats and Panchsheel Bhawan". The above work was awarded by the Respondent to the Petitioner

by a Letter of Acceptance ('LoA') dated 4th January, 2012 for a total value of Rs. 36,76,704.

3. It appears that on 14th September, 2015 two letters were written by the Petitioner. One was to the Chief Engineer, CPWD pointing out that work had been completed long back but the payment had still not been made to the Petitioner. Enclosed with this letter was a statement of claims/disputes which showed that the Petitioner was seeking reference of the disputes to arbitration. On the same date, i.e., 14th September, 2015 another letter was addressed by the Petitioner to the Superintendent Engineer, CPWD stating that a sum of Rs. 1 lakh had been withheld on account of non-receipt of 'Revised Technical Sanction'.

4. In response to the above letter, the CPWD wrote to the Petitioner on 21st October, 2015 stating in the first instance that "payment for your final bill for the above said work has been made on 28th August, 2015." It is further stated that a sum of Rs. 1 lakh that had been withheld on account of non-receipt of Revised Technical Sanction, had since been received and the payment had been released on 16th October, 2015. The letter then proceeded to deal with each of the claims/disputes raised by the Petitioner in Annexure 'A' to the letter dated 14th September, 2015 which had been addressed to the Chief Engineer. Each of the claims/disputes was rejected as "wrong and denied". This was reiterated by another letter dated 5th November, 2015 written by the CPWD to the Petitioner. The Petitioner states that thereafter it kept pursuing the matter by writing various letters.

5. On 29th February, 2016, the Petitioner made a request for appointment of

an Arbitrator after pointing out that it has been corresponding with the department regarding its balance payment for the last several months. The same claims/disputes which were enclosed with the letter dated 14th September, 2015 were enclosed with this letter. In reply to this letter, the Respondent again informed the Petitioner by its letter dated 27th June, 2016 that its request could not be acceded to. Thereafter, the present petition was filed.

6. A reply has been filed by the Respondent to the present petition where it was *inter alia* pointed out that no amount is due since the amount under the final bill had already been paid to the Petitioner way back on 28th August, 2015. Further, the sum of Rs. 1 lakh that has been withheld had also been released on 16th October, 2015.

7. Mr. Praveen Kumar Jain , learned counsel for the Respondent submitted that the request for the appointment of an Arbitrator was not made by the Petitioner within 120 days from the date of payment of the final bill i.e., 28th August, 2015. It is submitted, therefore, that the Respondent was justified in declining to appoint an Arbitrator. It is further pointed out that since under Clause 25 of the General Conditions of Contract ('GCC') the Chief Engineer declined to appoint an Arbitrator, the matter could therefore not be referred to arbitration at all. In support of the above submission, Mr. Jain placed reliance on the decision dated 22nd January, 2015 of the Supreme Court in Civil Appeal No. 1167 of 2015 (*Union of India v. Mohan Aggarwal Construction Co.*).

8. Mr. Sandeep Sharma, learned counsel appearing for the Petitioner, on the

other hand, pointed out that the letter dated 14th September, 2015 addressed by the Petitioner to the Chief Engineer should be taken to be a demand for reference of the disputes to the arbitration since that letter enclosed the proposed statement of claims/disputes of the Petitioner. These were in fact rejected by the Respondent by the letter in dated 21st October, 2015. Mr. Sharma sought to distinguish the decision in *Union of India v. Mohan Aggarwal Construction Co.* (*supra*) on the ground out that unlike that case, the invocation of the arbitration clause by the Petitioner in the present case was not beyond the period of 120 days from the date of payment of the final bill. Secondly, he submitted that the Supreme Court in *Union of India v. Mohan Aggarwal Construction Co.* (*supra*) did not notice an earlier decision of a Bench of the same strength in *Nandyal Coop. Spinning Mills Limited v. K.V. Mohan Rao (1993) 2 SCC 654* where a clause similar to Clause 25 of the GCC was interpreted and it was held that where the Chief Engineer declined to appoint an Arbitrator it was open to the aggrieved party to invoke the statutory process and approach the Court for the appointment of an Arbitrator.

9. The above submissions have been considered. As regards the delay in invocation of the arbitration clause, the Court would like to refer to the relevant portions of Clause 25 of the GCC which read thus:

“Clause 25

...

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 such Chief Engineer CPWD or Additional Director General or Director General of works, CPWD, 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 intimation from the Engineer-in-charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the Government 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 modifications or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause."

10. One of the conditions in the above clauses is that the contractor should make a request for the appointment of an Arbitrator in writing in respect of the claims "within 120 days of receiving the intimation from the Engineer-in-charge that the final bill is ready for payment..." In the present case, the Petitioner sent a letter on 14th September, 2015 raising claims in the Annexure to the letter pointing out that the said payment is due. According to the Respondent itself, the final bill was paid on 28th August, 2015. Therefore, it cannot be said that the demand by the Petitioner for reference of its claims was not made within 120 days thereafter.

11. The Court finds that in the reply dated 21st October, 2015, the Respondent itself dealt with each of the claims and rejected them. It is, therefore, not open to the Respondent to now contend that there was no

demand for arbitration made by the Petitioner by its letter dated 14th September, 2015. This is one factor that distinguishes the present case from the facts in ***Union of India v. Mohan Aggarwal Construction Co.*** (*supra*). There the Supreme Court found that the demand for arbitration had not been made by the claimant within 120 days of the intimation regarding preparation of the final bill.

12. On the second aspect viz., the rejection by the Chief Engineer of the request for appointment of an Arbitrator, the Court finds that the decision in ***Nandyal Coop. Spinning Mills Limited v. K.V. Mohan Rao*** (*supra*) squarely applies to the facts of the present case. There again there was Clause 65.1 (*in pari materia* with the Clause 25 of the GCC). It also provided that if for some reason it was not possible for the Arbitrator to be appointed in terms of the said clause, then the matter would not be referred "to arbitration at all". In that case, there was further Clause 65.2 which provided that "the provisions of the Arbitration Act, 1940 or any statutory modification or re-enactment thereof" shall "apply to the arbitration proceedings..." In the present case also, Clause 25 (ii) states that "the arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made thereunder and for the time being in force shall apply..."

13. In ***Nandyal Coop. Spinning Mills Limited v. K.V. Mohan Rao*** (*supra*), the Supreme Court interpreted the above clause as permitting the contractor to approach the Court for the appointment of an Arbitrator in the event of

the Respondent declining to appoint an Arbitrator. The specific contention of the Appellant in that case was that if the administrative head of the Appellant rejected the prayer to appoint an Arbitrator, “the only remedy open to the contractor was to have recourse to civil court” was “without force”. In the present case, the Clause itself envisages that the arbitration will be conducted in accordance with the provisions of the Act as amended from time to time.

14. It may also be noticed that the attention of the Supreme Court in ***Union of India v. Mohan Aggarwal Construction Co.*** (*supra*) does not appear to have drawn to the aforementioned earlier judgment in ***Nandyal Coop. Spinning Mills Limited v. K.V. Mohan Rao*** (*supra*) which has interpreted the identical clause.

15. In the present case, it might still have been possible for the Chief Engineer to be asked to appoint an Arbitrator. However, learned counsel for the Respondent states that it is practically impossible for the Chief Engineer to now appoint an Arbitrator as such person would not be qualified in terms of the Act as amended from 23rd October, 2015. The clause in the present case envisages the applicability of the Act “or any statutory modification or re-enactment thereof.” Therefore, learned counsel for the Respondent was right in contending that under the amended Act it is not possible for the Respondent to appoint an Arbitrator. When asked whether the Chief Engineer could appoint an independent person who may not be disqualified to act as an arbitrator, learned counsel for the Respondent answered in the negative stating that the Chief Engineer would not be permitted to

appoint a person other than an employee of the government itself.

16. It is high time that the Departments of the Union of India should frame a policy for the appointment of Arbitrators not inconsistent with the requirements of the Act as amended with effect from 23rd October, 2015 particularly since many of the standard clauses involving the Respondent talk of the applicability of the Act or “any statutory modification or re-enactment thereof”. A panel of competent persons both independent and qualified, to act as Arbitrators should be prepared by them for this purpose.

17. As far as the present case is concerned, with the Respondent being candid about the inability of the Chief Engineer to appoint an Arbitrator, the Court sees no impediment to refer the disputes to the arbitration of a sole Arbitrator appointed by the Court.

18. At this stage, learned counsels for the parties are agreeable to the Court appointing an Arbitrator to adjudicate their disputes including claims and counter-claims.

19. The Court proposes Mr. Prem Kumar, a former retired Additional District Judge (Mobile No. 9873176030), residing at 68B, Pocket-F, Alaknanda Gangotri Enclave, New Delhi as the sole Arbitrator to adjudicate the disputes between the parties including their claims and counter-claims. In the first instance, the proposed Arbitrator will make a disclosure in terms of Section 11 (8) read with Section 12 (1) of the Act and, thereafter, enter upon reference. In the event the disclosure is not made within a reasonable time or such disclosure discloses the inability of the proposed Arbitrator to act as such, it will be open to the parties to apply to this Court for directions. The proposed Arbitrator shall fix his own terms and communicate them to

the parties.

20. The parties are directed to appear before the proposed Arbitrator on 7th March, 2017 at 4:00 pm or such changed time and/or date that the learned Arbitrator finds convenient which will be communicated to the parties at least ten days in advance. The venue for the first hearing will be arranged by the Petitioner and communicated to the proposed Arbitrator and the Respondent at least one week prior to the date fixed. The expenses for the hearing shall be equally shared by the parties.

21. The petition is disposed of in the above terms. Order be given *dasti*. A certified copy of this order be delivered to the proposed Arbitrator forthwith.

FEBRUARY 02, 2017

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S. MURALIDHAR, J