

\$~1

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of decision: 10th July, 2018

+

ARB.P. 212/2018

VED PRAKASH MITHAL & SONS

..... Petitioner

Through

Mr.Peeyoosh Kalra, Ms.Sona Babbar
and Mr.Vishal Aggarwal, Advs.

versus

DELHI DEVELOPMENT AUTHORITY & ANR. Respondents

Through

Ms.Kanika Singh, Adv.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

NAVIN CHAWLA, J. (Oral)

1. This petition under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') has been filed by the petitioner seeking appointment of a Sole Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the Contract dated 02.05.2014 executed between the parties for carrying out the work of construction of 268 EWS Houses by the petitioner for the respondents. The Arbitration Agreement between the parties is contained in Clause 25, the relevant portion of which is reproduced herein below:

"CLAUSE 25

Settlement of Disputes & Arbitration.

(A) Except where otherwise provided in the contract, all questions and disputes 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 questions, 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 cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned 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 from receipt of the contractor's Appeal. If the contractor is dissatisfied with the 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.”

2. The primary contention raised by the respondents is that the present petition is not maintainable inasmuch as the petitioner has not followed the procedure prescribed in the Arbitration Agreement before filing of the present petition. To appreciate this submission reference would have to be made to the following facts/documents:

- The disputes having arisen between the parties, the petitioner addressed a letter dated 03/10.04.2017 to the Chief Engineer, Superintending Engineer and the Executive Engineer of the respondents raising certain claims.
- By another letter dated 29.05.2017 addressed to the Executive Engineer of the respondents, the petitioner while referring to the earlier letter dated 03.04.2017, called upon the Executive Engineer to communicate his decision on the issue raised by the petitioner.

Relevant extract from the letter is reproduced herein below:

“You are requested to do the needful and communicate your decision to us, besides paying our claims and dues, as raised by us vide our earlier letters.”

- The Executive Engineer of the respondent vide its letter dated 31.05.2017 responded to the above letter and in fact raised a claim against the petitioner.
- The petitioner, instead of following the procedure as prescribed

in Clause 25 and filing an appeal against this communication to the Superintending Engineer, vide letter dated 21.07.2017 called upon the Engineer Member of the DDA to appoint an Arbitrator. Having received no response to this request, the present petition has been filed.

3. A reading of the above sequence of events would show that the procedure as prescribed in Clause 25 of the Agreement has not been followed by the petitioner before invoking the Arbitration Agreement in form of its letter dated 21.07.2017 and filing of the present petition.

4. Section 11(6) of the Act would come into operation only where the other party fails to act as required under that procedure. The petitioner itself having not followed the procedure as prescribed in the Arbitration Agreement, cannot make a complaint against the respondents' alleged failure to act in accordance with the same.

5. This Court in its judgment dated 17.03.2009 passed in A.A.389/2006, ***Sushil Kumar Bhardwaj v. Union of India*** and other connected petitions, while examining the identical Clause in the contract of Municipal Corporation of Delhi and Government of NCT of Delhi, has held that the procedure of inviting the decision in writing on any claim/dispute, of approaching the Superintending Engineer and thereafter the Chief Engineer for decision on the dispute is to be exhausted before the Chief Engineer can be approached for appointment of an Arbitrator. It was further held that the procedure prescribed in Clause 25 is mandatory and not directory.

6. Learned counsel for the petitioner submits that with the Amendment to the Act by the insertion of Section 11(6A) in the Act by way of Arbitration and Conciliation (Amendment) Act 2015, the above judgment

would no longer be applicable. I am unable to agree with the said submission. Section 11(6A) of the Act is reproduced herein below:

“11(6A) The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.”

7. The above provision does not deal with the question of maintainability of the petition under Section 11(6) of the Act. A petition under Section 11(6) of the Act would be maintainable only where the respondent has failed to act in accordance with the procedure prescribed in the Arbitration Agreement. In the present case as the petitioner itself has not followed the procedure prescribed in the Arbitration Agreement, the petition is clearly pre-mature and would not be maintainable and therefore, the question of applicability of Section 11(6A) of the Act would not arise.

8. Learned counsel for the petitioner has further placed reliance on the judgments of this Court in *M/s Sikand Construction Co. v. State Bank of India*, ILR (1979) 1 Delhi 364 and *Saraswati Construction Company v. East Delhi Co-operative Group House Society Ltd.*, 57 (1995) DLT 343, to contend that where an Arbitration Agreement required the contractor to refer its disputes to the Architect and on being dissatisfied with the decision of the Architect invoke the Arbitration Agreement, this Court had held the said procedure to be directory and not mandatory.

9. It is noticed that both these decisions are based on Section 20 of the Arbitration Act, 1940 and were interpreting the specific Arbitration Agreement in question in those petitions. In view of the decision of this

Court in *Sushil Kumar Bhardwaj* (supra), specifically interpreting a pari materia Arbitration Agreement and the provision of Section 11(6) of the Act, these judgments would not be applicable and come to the aid of the petitioner.

10. Learned counsel for the petitioner has further placed reliance on the judgment of this Court in *Ravindra Kumar Verma v. BPTP Ltd. & Anr.* 2015(147) DRJ 175; judgment dated 30.01.2018 passed by this Court in Arb. P.243/2017 *Siemens Limited v. Jindal India Thermal Power Limited* and; *Indian Potash Limited v. Bohra Industries Ltd.*, 2011 (121) DRJ 601 in support of its submission that the procedure as prescribed in Clause 25 of the Agreement should be read as directory and not mandatory in nature.

11. In my view these judgments have no application to the facts of the present case inasmuch as they deal with the Arbitration Agreement, which required the party to first explore the possibility of an amicable settlement before seeking appointment of an Arbitrator. This is very different from the procedure as has been prescribed in Clause 25 of the Agreement in question, which not only provides for a hierarchical manner of adjudication of the claims raised by the Contractor, but also gives specific timeline for the decision of each authority.

12. In view of the above, the present petition is not maintainable and is dismissed, with no order as to cost.

NAVIN CHAWLA, J

JULY 10, 2018/Arya