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IN THE HIGH COURT OF DELHI AT NEW DELHI

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O.M.P. (T) (COMM.) 22/2018 & IA 7002/2018

K K BUILDERS PVT. LTD.

..... Petitioner

Through: Ms.Anushula Laroiya, Ms.Bani
Dikshit, Advs.

versus

ENGINEERING PROJECTS (INDIA) LTD. Respondent

Through: Mr.Sonal Kumar Singhm,
Mr.Paromita Majumdar, Ms.Seema Pandey,
Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

ORDER

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24.07.2018

This petition has been filed under Sections 14 read with
Section 15 of the Arbitration and Conciliation Act, 1996 *inter
alia* making the following prayers:-

- a) Allow the present petition and terminate the
mandate of existing arbitrator,*
- b) Appoint another independent and impartial
arbitrator with a direction to adjudicate the disputes and
differences between the parties expeditiously.”*

The disputes between the parties have arisen in relation to
the Work Order dated 24th December, 2003 for ‘Widening and
Strengthening of Roads in the State of Jharkhand’ issued by the
respondent in favour of the Petitioner.

The agreement between the parties contained an

arbitration agreement in Clause 27 read with Annexure A of the Additional Conditions of Contract, which is reproduced herienbelow:

Clause 27:

Both the parties shall make efforts to settle disputes amicably. Only if amicable settlement is not possible, the same shall be referred to the sole arbitration of the Chairman & Managing Director of EPI or the person appointed by the CMD, EPI and the decision of the arbitrator shall be final and binding on both the parties. Arbitration will be according to "Conciliation & Arbitration" clause which is enclosed at Annexure-A.

Annexure A:

'ANNEXURE - A TO ADDITIONAL CONDITIONS OF CONTRACT

CONCILIATION AND ARBITRATION

Before resorting to arbitration as per the clause given below, the parties if they so agree may explore the possibility of conciliation as per the provisions of Part-III of the Arbitration and Conciliation Act, 1996. When such conciliation has failed, the parties shall adopt the following procedure for arbitration:-

1. Except when otherwise provided for in the contract, any dispute and difference relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used in 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, 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 Arbitration of the Chairman and Managing Director (CMD) of Engineering Projects (India) Limited (EPI), or any other person discharging the functions of CMD of

EPI and if CMD or such person discharging the functions of CMD of EPI is unable to act, to the Sole Arbitration of some other person appointed by the CMD of EPI or such other person discharging the functions of CMD of EPI. There will be no objection if the arbitrator so appointed is an employee of the Engineering Projects (I) Ltd. However, such an employee shall not have directly dealt with the said contract or the works thereunder on behalf of EPI. Such Arbitrator shall be appointed within 30 days of the receipt of letter of invocation of arbitration duly satisfying the requirements of this clause.

2. If the arbitrator so appointed resigns his appointment, is unable or unwilling to act due to any reason whatsoever, or dies, the Chairman & managing Director aforesaid or in his absence the person discharging the duties of the CMD of EPI may appoint a new arbitrator in accordance with these term and conditions of the contract, to act in his place and the new arbitrator so appointed may proceed from the stage at which it was left by his predecessor.

3. It is a term of the contract that the party invoking the arbitration shall specify the dispute/differences or questions to be referred to the arbitrator under this clause together with the amounts claimed in respect of each dispute.

4. The arbitrator may proceed with the arbitration ex-parte, if either party, in spite of a notice from the arbitrator, fails to take part in the proceedings.

5. The work under the contract shall continue, if required, during the arbitration proceedings.

6. The Arbitrator shall make speaking Award and give reasons for his decision in respect of each dispute/claim along with the sums awarded separately on each individual item of dispute or difference or claims. The Arbitrator shall make separate award on each reference made to him.

7. The award of the arbitrator shall be final, conclusive and binding on both parties.

8. *Subject to the aforesaid, the provisions of the Arbitration and Conciliation Act, 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 proceedings and Arbitrator shall publish his Award accordingly.”*

Disputes having arisen between the parties, the respondent vide letter dated 22nd July, 2011 appointed one Mr. Achintya Biswas as the Sole Arbitrator. The said Arbitrator conducted the arbitration proceedings and it is submitted by the petitioner that the said proceedings, in a period of almost 3 years, could only reach the stage of framing of issues, when the said Arbitrator tendered his resignation on 25th February, 2014.

Thereafter, the respondent vide its letter dated 11th March, 2014 appointed Mr. S.Roy Chowdhury, General Manager of the respondent as a substitute Arbitrator. The said Arbitrator conducted arbitration proceedings on 15th July, 2014 and thereafter, in spite of request of the petitioner, has not conducted any other arbitration proceeding.

Counsels for the parties inform that after filing of the present petition, the said Arbitrator has tendered his resignation on 30th March, 2018. In this manner, prayer (a) made in the petition stands satisfied.

As far as prayer (b) regarding appointment of another Arbitrator is concerned, the counsel for the respondent submits that the petitioner has not approached the respondent making a grievance regarding the delay in conducting of the arbitration

proceedings by the substitute Arbitrator and therefore, in terms of Section 15(2) of the Act, the substitute Arbitrator should be allowed to be appointed in accordance with the procedure contained in the arbitration agreements that is, by the respondent

I am unable to agree with the submission made by the counsel for the respondent.

The arbitration proceedings have been pending since the last almost 7 years and have only reached the stage of framing of issues. In this interregnum, the respondent has appointed two Arbitrators and both, after having consumed a considerable period of time, have tendered their resignation. Both the Arbitrators were employees of the respondent and were therefore, under their control, however, the respondent took no steps to ensure an expeditious disposal of the arbitration proceedings. In *Union of India vs. Singh Builders Syndicate*, (2009) 4 SCC 523 the Supreme Court, dealing with the similar situation has held as under:-

“15. The object of the alternative dispute resolution process of arbitration is to have expeditious and effective disposal of the disputes through a private forum of the parties’ choice. If the Arbitral Tribunal consists of serving officers of one of the parties to the dispute, as members in terms of the arbitration agreement, and such tribunal is made non-functional on account of the action or inaction or delay of such party, either by frequent transfers of such members of the Arbitral Tribunal or by failing to take steps expeditiously to replace the arbitrators in terms of the arbitration agreement, the

Chief Justice or his designate, required to exercise power under Section 11 of the Act, can step in and pass appropriate orders.

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17. Constituting Arbitral Tribunals with serving officers from different far-away places should be avoided. There can be no hard-and-fast rule, but there should be a conscious effort to ensure that the Arbitral Tribunal is constituted promptly and arbitration does not drag on for years and decades.

18. As noticed above, the matter has now been pending for nearly ten years from the date when the demand for arbitration was first made with virtually no progress. Having regard to the passage of time, if the Arbitral Tribunal has to be reconstituted in terms of Clause 64, there may be a need to change even the other two members of the Tribunal.

19. The delays and frequent changes in the Arbitral Tribunal make a mockery of the process of arbitration. Having regard to this factual background, we are of the view that the appointment of a retired Judge of the Delhi High Court as sole arbitrator does not call for interference in exercise of jurisdiction under Article 136 of the Constitution of India.”

In view of the above, I do not consider this to be a fit case where the respondent can be called upon to appoint yet another Arbitrator. I appoint **Justice Anil Kumar**, Retired Judge of this Court (R/o B-33, Pachsheel Enclave, New Delhi-110017, Mobile: 9818000140) as an Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the above-mentioned Work Order.

The arbitration shall commence from the stage that it was

before the earlier Arbitrator. The parties shall be at liberty to file copies of their respective pleadings /documents that they had filed before the earlier arbitrator.

The petition is allowed in the above terms with no order as to costs.

NAVIN CHAWLA, J

JULY 24, 2018
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