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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ARB.P. 657/2018

CONTINENTAL ENGINEERING CORPORATION Petitioner

Through: Mr.Atul Sharma, Mr.Abhinav Sharma,
Ms.Shreya Jain, Advs.

versus

GOVT OF NCT OF DELHI THROUGH: PUBLIC WORKS
DEPARTMENT

..... Respondent

Through: Mr.Anupam Srivastava, ASC, GNCTD
with Mr.Dhairya Gupta, Adv.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

ORDER

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16.11.2018

1. This petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') seeks appointment of an Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the award of Work of Project for Comprehensive Development of Corridor (Outer Ring Road) between Mukarba Chowk to Wazirabad Chowk SH:- C/o Flyovers, Loops, Bridges across supplementary drain, FOBs, footpath, Cycle Track, Widening of road on embankment, Rainwater Harvesting schemes, Electrical Works and other allied works by the respondent to the petitioner vide Agreement dated 28.05.2013.

2. The Arbitration Agreement between the parties is contained in Clause 25 of the General Conditions of Contract and provides for appointment of a Sole Arbitrator by the Chief Engineer of the Public Works Department (PWD).

3. Disputes having arisen between the parties, the petitioner invoked the Arbitration Agreement vide its notice dated 27.04.2018.
4. The Principal Chief Engineer (PCE), PWD vide communication dated 10.05.2018 appointed one Sh.K.K.Peshin, Retired ADG, CPWD as a Sole Arbitrator. The Sole Arbitrator vide his communication dated 17.05.2018 expressed his inability to accept such appointment on the ground that he had been appointed in five cases as an Arbitrator by the respondent. He relied upon serial No.2 of the Terms and Conditions of the Notice Inviting Applications for empanelment of Arbitrators issued by the respondent in this regard. The respondent, thereafter, vide letter dated 13.06.2018 advised the Arbitrator to accept the appointment stating that there was no such condition in his appointment letter empanelling him as an Arbitrator. Based on this advise, the Arbitrator accepted the appointment and issued notice of hearing to the parties on 04.08.2018.
5. Counsel for the petitioner submits that this communication was not received by the petitioner before filing of the present petition as it had been sent to a wrong address. I need not go in this controversy for the order that I propose to pass.
6. Serial No.2 of the Terms and Conditions attached to the Notice Inviting Applications for empanelment of Arbitrators in PWD, GNCTD is reproduced hereinbelow:-

“Terms and Conditions:

The following terms and conditions shall apply to the empanelled arbitrators:

1. xxxxxx

2. The empanelled arbitrator shall not have more than 5 cases of PWD Delhi in hand at a time. He will inform all the Chief Engineers of the Zones for which he has been empanelled as and when the pending cases with him are 5 in nos. He will also inform them when the pending cases have dropped below 5 so that the department can send such cases again to him till it reaches 5.”

7. The above being a term and condition of empanelment laid down by the respondent itself, it could not have breached the said condition while making the appointment of the Arbitrator. The Arbitrator having very fairly pointed out this aspect to the respondent in his communication dated 17.05.2018, the respondent should have proceeded to appoint some other Arbitrator taking note of the ineligibility of the Arbitrator. However, the respondent insisted upon the same Arbitrator to accept such appointment. The Arbitrator has accepted such appointment, however, the ineligibility attached to such appointment due to the Terms and Conditions of his empanelment subsists and cannot be washed away.

8. I may only note that even the Fifth Schedule to the Act in Entry 22 provides that where an Arbitrator has within the past three years been appointed as an Arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties, the same shall give rise to justifiable doubts as to the independence or impartiality of such Arbitrator. The respondent, being aware of such statutory condition, had itself mandated that the empanelled Arbitrator would not have more than five arbitrations of PWD Delhi in hand at a given time. This is also in consonance with the Sixth Schedule of the Act and the

time frame of one year for completion of the arbitration proceedings provided in Section 29A of the Act. Clearly, if the Arbitrator is handling more than five arbitrations, the respondent was of the opinion that such Arbitrator would not be able to complete the proceedings within the stipulated time.

9. Counsel for the respondent submits that the above condition was only in the Notice Inviting Applications but was not incorporated in the final empanelment order by which the Arbitrators, including the Arbitrator in the present case, had been empanelled. I cannot agree with the same as the Notice Inviting Applications itself states that the above will be a condition of empanelment. In any case, as noted above, this condition had been inserted keeping in mind the mandate and object of the Act and therefore, should be welcomed rather than discarded while issuing final empanelment order.

10. In view of the above, in my opinion, the appointment of the Arbitrator by the respondent, being contrary to its own laid down Terms and Conditions, was *void ab initio* and cannot be accepted by this Court.

11. In view of the above, I appoint **Mr.Kailash Gambhir**, Retired Judge of this Court, 45, Lodhi Estate, New Delhi, Mobile-9871300033, 011-24644555(Residence), as the Sole Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the above referred Agreement. The Arbitrator shall give disclosure under Section 12 of the Act before proceeding with the reference.

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

NAVIN CHAWLA, J

NOVEMBER 16, 2018
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