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

+ **ARB.P. 544/2017**

ASHOK KUMAR JAIN, PROPRIETOR, NEW
TECH (INDIA)

..... Petitioner

Through Ms Stuti Jain, Mr Ratneshwar Pandey,
Advocates.

versus

NEW DELHI MUNICIPAL COUNCIL

..... Respondent

Through Mr Anil Grover, Stading Counsel with
Ms Noopur Singhal, Advocate.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU

ORDER

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07.05.2018

1. The petitioner has filed the present petition under Section 11 (6) 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 connection with the contract awarded pursuant to the letter of award dated 16.02.2015. Admittedly, the contract between the parties includes an arbitration clause. The relevant extract of which is set out below:-

“CLAUSE 25

SETTLEMENT OF DISPUTES & ARBITRATION

Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, design drawings and instructions here-in before mentioned and as to the 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 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 of receipt of contractor's appeal. If the contractor is dissatisfied with the decision of the Chief Engineer, the contractor may within 30 days from the receipt of the Chief Engineer decision, appeal before the Dispute Redressal Committee (DRC) along with a list of disputes with amounts claimed in respect of each such dispute and giving reference to the rejection of his disputes by the Chief Engineer. The Dispute Redressal Committee (DRC) shall give his decision within a period

of 90 days from the receipt of Contractor's appeal. The constitution of Dispute Redressal Committee (DRC) shall be as indicated in Schedule 'F'. If the Dispute Redressal Committee (DRC) fails to give his decision within the aforesaid period or any party is dissatisfied with the decision of Dispute Redressal Committee (DRC), then either party may within a period of 30 days from the receipt of the decision of Dispute Redressal Committee (DRC), give notice to the Chief Engineer for appointment of arbitrator on prescribed proforma as per Appendix XV, failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

It is a term of contract that each party invoking arbitration must exhaust the aforesaid mechanism of settlement of claims/disputes prior to invoking arbitration.

- (II) Except where the decision has become final, binding and conclusive in terms of Sub Para (i) above disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Chairperson NDMC. If there be no Chairperson, the administrative head of NDMC. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever, another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

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 along with 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 Chairperson NDMC or the administrative head of NDMC 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 the 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 NDMC 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.

It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs.1,00,000/-, the arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the arbitrator, these shall be paid equally by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims.

The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid.”

2. In view of the disputes that have arisen between the parties, the petitioner issued a notice dated 01.09.2016 to the Superintending Engineer, New Delhi Municipal Council (NDMC) requesting that the amount withheld and the security deposit be released. The petitioner specifically requested that a decision in regard of his claims be made in terms of Clause 25 of the agreement. However, the petitioner did not receive any response to the said request. Thereafter, the petitioner issued a notice dated 19.09.2016 to the Chief Engineer (C-I), NDMC once again raising disputes that neither the Executive Engineer nor the Superintending Engineer had rendered a decision in terms of Clause 25 of the Agreement. The petitioner claims it did not receive any response to the said letter as well. In view of the above, the petitioner was constrained to issue a notice dated 20.10.2016 to the Chairperson, NDMC requesting that the disputes raised be decided. This letter also did not elicit any response from the Chairperson of the respondent.

3. Since Dispute Resolution Committee has not been specified, the petitioner issued a notice invoking the arbitration clause seeking appointment of an arbitrator. In response to the aforesaid notice the

respondent sent a letter dated 17.04.2017, *inter alia*, stating that ‘*neither any claim nor appointment of arbitrator is justified, hence rejected*’. It is thus apparent that despite the petitioner exhausting the procedure provided under Clause 25 of the agreement, the respondent has not appointed an arbitrator.

4. The learned counsel appearing for the respondent states that the petitioner was required to issue notice for appointment of the arbitrator to the Chairperson of NDMC and, therefore, had not exhausted the procedure as provided in Clause 25 of the Agreement. This contention is unmerited as in terms of the arbitration clause, the petitioner was required to issue a notice to the Chief Engineer although the arbitrator was to be appointed by the Chairperson, NDMC. Thus, the petitioner has invoked the arbitration clause in terms thereof.

5. Since there is no dispute as to the existence of the arbitration agreement, it is necessary that an arbitrator be appointed.

6. Mr R. Sudhinder, Advocate (Mobile No. 9810333908) 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 arbitrator shall fix the arbitral fees in consultation with the learned counsel for the parties.

7. The parties are at liberty to approach the arbitrator for further proceedings.

8. The petition is disposed of in the aforesaid terms.

VIBHU BAKHRU, J

MAY 07, 2018/pkv