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

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Date of decision: 10.10.2019

+ ARB.P. 535/2019

M/S RAMACIVIL INDIA CONSTRUCTION PVT. LTD.

..... Petitioner

Through: Mr. Avinash Trivedi & Mr. Umesh
Kashyap, Advocates

versus

DELHI STATE INDUSTRIAL & INFRASTRUCTURE
DEVELOPMENT CORPORATION LTD. (DSIIDC)

..... Respondent

Through: Mr. Anuj Chaturvedi, Advocate with
Mr. D.P. Dwivedi, AEE & Mr. Vijay
Pal Singh, EE

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JYOTI SINGH, J. (ORAL)

1. This is a petition filed under Section 11(6) of the Arbitration & Conciliation Act, 1996, ('the Act') for appointment of Sole Arbitrator to adjudicate the disputes between the parties.
2. It is the case of the petitioner that the respondent had awarded work of "Construction of Academic Building Fashion Centre and Hostel at NIFT Hauz Khas, New Delhi" to the petitioner vide letter of acceptance dated 30.12.2013. The contractual amount of the work was Rs.43,49,41,397/- and the duration of work was for a period of 24 months.
3. As per the averments in the petition, the petitioner had mobilised all resources to execute the work, but the same could not be completed within the stipulated date of completion, due to several hindrances at

site caused by the respondent. The petitioner thereafter submitted the 13th and Final Bill to the respondent vide letter dated 31.7.2018, but the payment against the said bill was never released. The petitioner thereafter submitted a request letter dated 31.8.2018 to the Superintending Engineer followed by a letter dated 4.10.2018 to the Chief Engineer. Vide letter dated 5.11.2018, the petitioner invoked the arbitration clause and sought appointment of the Arbitrator.

4. A reply dated 16.11.2018 was received from the office of the Chief Engineer denying the request of the petitioner for appointment of the Arbitrator. The petitioner in turn wrote to the respondent vide letter dated 21.11.2018 categorically pointing out that under the arbitration agreement governing the parties while there was a requirement of referring the disputes to a Dispute Redressal Committee, whose constitution was as given in Schedule 'F' appended to the Agreement but actually no such Dispute Resolution Committee was in existence. The petitioner reiterated its request vide letter dated 29.04.2019 to the Chief Engineer to appoint an arbitrator. On 14.5.2018, the respondent wrote to the petitioner that the matter of appointment of Arbitrator was under process.
5. Since the Arbitrator was not appointed by the respondent, the petitioner has filed the present petition.
6. Despite opportunities, the respondent had not filed a reply. When the matter was taken up today, the respondent sought permission to place the affidavit on record. Advance copy was given to the counsel for the petitioner who categorically stated that he did not want to file any response to the affidavit and that the matter be heard.

7. Learned counsel for the respondent submitted that the contract between the parties was governed by the CPWD Works Manual, 2012. This position cannot be disputed by the petitioner since in his own correspondences with the respondent it has referred to the said Works Manual and has also sought certain claims to be paid in accordance with the said Manual. Learned counsel contends that Clause 35.1 of Section 35 of the said Manual requires the constitution of a Dispute Redressal Committee (DRC) as an internal mechanism to resolve the disputes between the parties. If a contractor is not able to resolve the disputes by referring his grievances to the Chief Engineer then the matter has to be referred to the DRC for adjudication. It is only after the internal reference to the DRC is made and the said remedy is exhausted, Arbitration can be invoked. He further points out that in every region there is a DRC and its constitution is given in Clause 35.1 (A) of the Works Manual. He thus contends that the petitioner having not exhausted the remedy of approaching the DRC cannot seek appointment of an Arbitrator and the petition ought to be dismissed.
8. Learned counsel for the respondent has relied on the judgment of this Court in the case of *Ved Prakash Mithal and Sons Vs. Delhi Development Authority, 2018 SCC OnLine Del 9884*, wherein this Court while examining a similar clause providing for an internal mechanism of dispute resolution has held that if a party has not followed the procedure prescribed in the arbitration agreement and has directly approached for appointment of an Arbitrator under Section 11(6)(a) of the Act, the petition will be premature. The procedure

prescribed for internal and amicable resolution is mandatory and not directory.

9. Per contra, learned counsel for the petitioner has argued that when the contract was placed on the petitioner it contained arbitration clause No. 25. Subsequently, a correction slip No. 3 was issued which provided that if the contractor was dissatisfied with the decision of the Chief Engineer, then within 30 days it could appeal before the DRC and the constitution of the DRC shall be indicated in Schedule F. He further submits that a bare perusal of the constitution of the Committee given in Schedule F would show that, in fact, the DRC was never constituted and there were blanks left against the appointments of the Chairman and the Members. Relevant part of the Clause is reproduced as under:

“... 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’s 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.”

10. The relevant portion of Schedule F is reproduced as under:

Reference	Existing Provision	Modified Provision
CPWD – 7/8 Schedule – F	No provision	Following new Para is added: Clause 25 Constitution of Dispute Redressal Committee: Chairman- Member- Member-

11. Learned counsel further points out that the petitioner had categorically written to the respondent pointing out that DRC was not constituted and the petitioner therefore could not appeal to non-existing DRC and there was no provision for the Chief Engineer to constitute the DRC. He submits that there was no response whatsoever to this letter by the respondent. Thus, in these circumstances the petitioner could not exhaust the remedy of resolving the dispute through an internal mechanism of appealing to the DRC and has filed the present petition.
12. I have considered the submissions of the parties. The contract between the parties is governed by an Arbitration Clause which has been extracted above.

13. Respondent has not denied the existence of the arbitration clause. The main plank of the argument of the respondent is that the petitioner should have first exhausted the remedy of appeal before DRC before seeking appointment of the Arbitrator. The documents placed on record by the petitioner indicate that when the contract was placed on the petitioner the documents appended thereto did contain an Appendix 'F' as per which the DRC was to be constituted. However, a perusal of the said schedule would show that in fact it only contained blanks and it was not known as to who would be the members of the DRC. The petitioner did make an attempt to point out this fallacy to the respondent and also wrote to them how an appeal could lie to a non-existing DRC. Admittedly, there was no response to the said letter. The letters invoking arbitration also went in vein.
14. In these circumstances, the respondent cannot argue that the petitioner did not make an attempt to exhaust the remedy of approaching the DRC. Even during the hearing the counsel for the respondent was unable to point out any letter by which the petitioner was informed of the constitution of the DRC and in fact it was admitted that the letter dated 21.11.2018 written by the petitioner was never responded to by the respondent. In so far as the judgment relied upon by counsel for the respondent is concerned, in my opinion, the same would not apply to the facts of the present case. There cannot be a quarrel with the proposition that if the arbitration clause provides a mechanism of approaching a Committee or an Authority within the Department, then the remedy would have to be exhausted before the Arbitrator can be appointed. However, it is not disputed that in the present case the

petitioner did write to the respondent to find out the constitution of the committee but there was no response from the respondent. In these facts it cannot be said that the petitioner has failed to exhaust the remedy of the internal mechanism as per the terms of the agreement.

15. Since the respondent has not nominated an Arbitrator despite several letters of the petitioner requesting them to do so under the Arbitration Clause between the parties, the respondent has forfeited its right to appoint an Arbitrator.
16. In view of the above, I appoint Hon'ble Mr. Justice M.L. Mehta, former Judge of this Court to act as Sole Arbitrator for adjudication of the disputes between the parties.
17. The address and mobile number of the Learned Arbitrator is as under:

Hon'ble Mr. Justice M.L. Mehta
Former Judge of Delhi High Court
H-34, Jangpura Extension,
New Delhi-110014
Mobile No. 9910384620
18. The Sole Arbitrator will give disclosure under Section 12 of the Act before entering upon reference.
19. The fee of the Arbitrator shall be as per Fourth Schedule to the Act.
20. The petition is disposed of in the aforesaid terms.

JYOTI SINGH, J

OCTOBER 10, 2019

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