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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **ARB.P. 714/2019**

GANNON DUNKERLEY & CO. LIMITED Petitioner

Through: Mr.Aseem Chaturvedi and
Ms.Raddhika khanna, Advs.

versus

HSCC (INDIA) LIMITED Respondent

Through: Mr.Saurabh Mishra, Ms.Aashaa
Bhatia, Ms.Samridhi Pal and
Mr.Abhishek, Advs. with Mr.Vivek
Tyagi, Sr. Legal Manager, HSCC

CORAM:

HON'BLE MR. JUSTICE V. KAMESWAR RAO

ORDER

% **22.01.2020**

1. This is a petition filed by the petitioner under Section 11 of the Arbitration & Conciliation Act, 1996 ('Act of 1996' for short) with the following prayers:-

"In view of the facts and circumstances as have been stated hereinabove, it is most respectfully prayed that this Hon'ble Court may kindly be pleased to:-

(a) Allow the present Petition and the Hon'ble Chief Justice or his designate be pleased to appoint a sole arbitrator to adjudicate the disputes between the parties arising out of the contract between the parties dated 29 August 2016; and

(b) Pass any other Order or Orders which is deemed fit and proper in the facts and circumstances of the present case."

2. The facts as noted from the petition are that the petitioner is inter-alia, engaged in the business of infrastructure development and construction of public sector projects. The respondent is a Government of India enterprise and is an executing agency of the Ministry of Health and Family Welfare, Government of India now under the administrative control of Ministry of Housing and Urban Affairs. The respondent had issued an e-Tender dated December 18, 2015, inviting eligible contractors for various construction works to be carried out under Pradhan Mantri Swasthya Suraksha Yojna. Construction of a Super-speciality Block at North Bengal Medical College, Siliguri, West Bengal, was one of the items of work which formed a part of the NIT dated December 18, 2015 and the estimated value of the work was Rs.71,93,00,000/-.

3. The Petitioner participated in the NIT and was adjudged as the successful tenderer and was awarded the contract for construction. An agreement was executed between the parties on August 29, 2016. It is the case of the petitioner that impediments faced by it, on enumerable occasions, were brought to the notice of the respondent.

4. It is the case of the petitioner that despite that, the respondent issued on March 28, 2019, a show cause notice, as to why the contract should not be terminated. Pursuant thereto, on May 08, 2019, the contract was terminated by the Engineer, In-Charge. It is the case of the petitioner that as per Clause 25 of the GCC, any contractor who is aggrieved by a decision given by the Engineer-in-Charge is required to request the authority indicated in Schedule F, in writing for a decision. It further provides that a contractor dissatisfied with the decision of the Reviewing Authority may, within 15 days, appeal to the Appealing Authority. On being dissatisfied

with the decision of the Appealing Authority, the contractor may within 30 days from the decision of the Appealing Authority, apply before the Disputes Redressal Committee. The petitioner being aggrieved with the termination of its contract, made an application before the Reviewing Authority on May 24, 2019, who upheld the termination notice. The petitioner, thereafter, preferred an appeal before the Appealing Authority on June 18, 2019, wherein, the Appealing Authority also upheld the order passed by the Reviewing Authority.

5. According to the petitioner, the constitution of the Dispute Redressal Committee makes the entire process vitiated and nugatory, inasmuch as, the Reviewing Authority and the Appellate Authority form part of the Dispute Redressal Committee. Accordingly, the petitioner did not approach the DRC and by way of a letter dated September 04, 2019 invoked the arbitration and called upon the respondent to appoint an Arbitrator to adjudicate the dispute between the parties as per clause 25 of the GCC. The respondent, in response to the letter invoking the arbitration agreement and for appointment of an arbitrator, by a letter dated September 30, 2019 has called upon the petitioner to withdraw the notice and thereby refused to appoint an arbitrator.

6. The learned counsel for the petitioner has reiterated the stand as taken by the petitioner in the petition.

7. On the other hand, learned counsel for the respondent, has by referring to the following paragraph of Clause 25 of the GCC, which relates to Settlement of Disputes & Arbitration, would submit that as the petitioner has not given any notice to the Client i.e Ministry of Health and Family Welfare for appointment of an arbitrator on prescribed proforma, as per

Appendix 15 and only invoked the arbitration clause vide letter dated September 04, 2019, by addressing the same to the respondent herein, the present petition under Section 11 of the Act of 1996 is not maintainable.

“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 Client 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.”

8. On a specific query to the learned counsel for the respondent as to who is the Competent Authority to appoint the arbitrator, learned counsel for the respondent conceded that it is the respondent, who is the designated Authority of the executing agency competent to appoint an Arbitrator. If that be so, the only plea of the learned counsel for the respondent is without any merit. In this regard, I may only reproduce the stand of the respondent in their reply dated September 30, 2019 to the invocation notice of the petitioner vide letter dated September 04, 2019 as under:-

“At the outset without going into the contents of the said notice, it is stated that as per General Conditions of Contract Clause 25 (i) of the subject agreement, the notice for appointment of arbitrator is required to be given to Client on prescribed proforma as per Appendix XV. The 'Client or MoHFW' is defined in Special Condition Contract clause J(n) of the subject

*Agreement as Ministry of Health and Family Welfare.
Government of India. New Delhi.*

That from the above it can be seen that the Notice has not been addressed to the Client, hence the Notice cannot be treated as notice for appointment of arbitrator as stipulated under General Conditions of Contract Clause 25 (i) of the subject agreement., accordingly the cognizance of Notice cannot be taken.

In view of above you are called upon to withdraw the Notice, henceforth and if you still insist on the Notice and take any steps in furtherance of the Notice, the same shall be defended at your risk and cost.

This Communication is without prejudice to the right of HSCC. (India) limited as executing agency under the subject agreement and also without prejudice to the right of Designated Authority of Executing agency to appoint sole arbitrator in terms of GCC clause 25(ii) of the subject mentioned Agreement.”

9. This Court is of the view that the invocation having been made with the designated Authority competent to appoint an Arbitrator and the Authority having not appointed an Arbitrator, within the prescribed 30 days limit, has forfeited its right to appoint an Arbitrator. Accordingly, this Court appoints Justice Dipak Misra, Former Chief Justice of India, as the sole Arbitrator, who shall adjudicate the disputes and differences between the parties. The appointment of a Sole Arbitrator shall be regulated by the Arbitration & Conciliation Act, 1996. The parties are at liberty to take all such pleas, as available to them, both on facts and in law before the learned Sole Arbitrator.

10. The petition is disposed of. No costs.

A copy of this order be sent to Justice Dipak Misra, Former Chief Justice of India.

V. KAMESWAR RAO, J

JANUARY 22, 2020/ak