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

Decided on 19th November, 2020

+ **ARB.P. 421/2020**

BRILLTECH ENGINEERS PRIVATE LIMITED... Petitioner
Through: Mr. Ankur Singhal, Adv.

versus

DARRAMEKS HOTELS
DEVELOPERS PRIVATE LIMITED Respondent
Through: Mr. Ankit Parhar, Adv.

CORAM:
HON'BLE MR. JUSTICE C .HARI SHANKAR

JUDGEMENT (ORAL)

% 19.11.2020

(Video-Conferencing)

C .HARI SHANKAR, J.

1. The issue in this petition appears to be covered, against the petitioner, by several authorities of this Court.

2. A notice, inviting tenders for electrical works in connection with construction of the “Taj Vivanta” Hotel at Singthali, Rishikesh, was issued by the respondent.

3. The petitioner was one of the bidders to whom, *vide* Letter of Acceptance (LOA), dated 25th May, 2015, the contract was awarded by the respondent. The contract was for ₹ 4,56,56,420/- and the

petitioner was required to carry out electrical works in connection with the construction of the “Taj Vivanta” hotel. Thereafter, the LOA was split in two parts, with part of the contract work, of ₹ 3,96,05,050/-, being awarded to the petitioner *vide* purchase order dated 25th May, 2015 and the second part, worth ₹ 55,99,326/-, being awarded to M/s. Brilltech India Exports Private Limited, a sister concern of the petitioner, *vide* purchase order dated 9th July, 2015.

4. The petition alleges that there were several defaults, in the matter of payments, by the respondent, who was also making unjustified deductions. It is not necessary, for the purposes of this order, to enter into the specifics of the various disputes raised by the petitioner. Suffice it to state that, despite various communications between the petitioner and the respondent back and forth, the petitioner claims that certain amounts remained to be paid to it. The total outstanding amount payable to the petitioner by the respondent, according to the petition, is ₹ 51,49,719.10/-.

5. The petition further asserts that attempts, to resolve the disputes, did not fructify, resulting in a legal notice, dated 21st August, 2020, being issued by the petitioner to the respondent, requiring the respondent to liquidate the allegedly outstanding amount of ₹51,49,719.10/-, along with liquidated damages of ₹ 22,82,821.00/-. As the respondent did not comply with this request, the petitioner seeks reference of its claims to arbitration.

6. Clause 52.2 of the General Conditions of Contract (GCC),

governing the relationship between the petitioner and the respondent, provides for arbitration as the mode of resolution of disputes, and reads thus:

“52.2 ARBITRATION

52.2.1 Any dispute arising out of a Notified Claim of the Contractor include in the Final Bill of the Contractor in accordance with the provisions of Clause 52.1.2 hereof, and any dispute arising out of any Claim(s) of the Owner against the Contractor shall be referred to the arbitration of a Sole Arbitrator selected in accordance with the provisions of Clause 52.2.2 hereof. It is specifically agreed that the Owner may prefer its Claim(s) against the Contractor as counter-claim(s) if a Notified Claim of the Contractor has been referred to arbitration. The Contractor shall not, however, be entitled to raise as a set-off defence or counter-claim any claim which is not a Notified Claim included in the Contractor's Final Bill in accordance with the provisions of Clause 52.1.1 hereof.

52.2.2 The Sole Arbitrator referred to in Clause 52.1.1 hereof shall be selected by the Contractor out of a panel of 3 (three) persons nominated by the Owner for the purpose of such selection, and should the Contractor fail to select an arbitrator within 30 (thirty) days of the panel of names of such nominees being furnished by the Owner for the purpose, the Sole Arbitrator shall be selected by the Owner out of the said panel.

52.2.3 The provisions of the Indian Arbitration & Conciliation Act, 1996 and any reenactment(s) and/or modification(s) thereof and of the Rules framed there under shall apply to arbitration proceedings pursuant hereto subject to the following conditions:

- (a) The Arbitrator shall give his Award separately in respect of each Claim and Counter-Claim; and
- (b) The Arbitrator shall not be entitled to review any decision, opinion or determination (howsoever expressed) which is stated to be final and/or binding on the Contractor in terms of the Contract Documents.

52.2.4 The venue of the arbitration shall be New Delhi, provided that the Arbitrator may with the consent of the Owner and the Contractor agree upon any other venue.

52.2.5 The Contractor shall not refuse to make a selection within the provisions of Clause 52.2.2 hereof nor after making a selection shall be entitled to contest the Award or otherwise refused to be bound by the decision of the Arbitrator on the ground that one or more or all the persons nominated by the Owner for selection of the Sole Arbitrator is or are connected with the Owner.

52.2.6 Notwithstanding the existence of any arbitration in terms hereof or otherwise, the Contractor shall continue and be bound to continue and perform all its/his outstanding obligations in all respects under the Contract (unless the Contract is determined by the Owner), and the Contractor shall remain liable and bound in all respects under the Contract.”

7. A reading of Clause 52.2.1 reveals that the remedy of arbitration has been provided, contractually, only in respect of disputes arising out of *notified claims* of the contractor, included in the final bill, in accordance with the provisions of Clause 52.1.2.

8. Clause 52 of the GCC, which refers to notification of claims, reads thus:

“52. NOTIFICATION OF CLAIMS AND SETTLEMENT OF DISPUTES/ARBITRATION:

52.1 Claims by the Contractor:

52.1.1 Should the Contractor consider that he is entitled to any extra payment or compensation in respect of the works over and above the amounts due in terms of the Contract as specified in Clause 52.2 hereof, the Contractor shall

forthwith give notice in writing of his claim in this behalf to the Project Manager and the Owner within 10 (ten) days from the date of the issue of orders or instructions relative to any works for which the Contractor claims such additional payment or compensation or of the happening of other event upon which the Contractor bases such claim, and such notice shall give full particulars of the nature of such claim, grounds on which it is based, and the amount claimed. The Owner shall not anyway be liable in respect of any claim by the Contractor unless notice of such claim shall have been given by the Contractor in the manner and within the time aforesaid and the Contractor shall be deemed to have waived any and all claims and all his rights in respect of any claim not notified in writing in the manner and within the time aforesaid.

52.1.2 Any claims of the Contractor notified in accordance with the provision of Clause 52.1.1 hereof as shall remain at the time of preparation of Final Bill by the Contractor shall be separately included in the Final Bill prepared by the Contractor in the form of a Statement of Claims attached thereto, giving particulars of the nature of the claim, grounds on which it is based, and the amount claimed and shall be supported by a copy(ies) of the notice(s) sent in respect thereof by the Contractor to the Project Manager and to the Owner under Clause 52.1.1 hereof. In so far as such claim shall in any manner or particular be at variance with the claim notified by the Contractor within the provision of Clause 52.1.1 hereof, it shall be deemed to be a claim different from the notified claim with consequence in respect thereof indicated in Clause 52.1.1 hereof, and with consequences in respect of the notified claim as indicated in Clause 52.1.1 hereof.

52.1.3 The Owner shall not anyway be liable in respect of any notified claim not specifically reflected in the Final Bill in accordance with the provisions of Clause 52.1.2 hereof and any and all notified claims not specifically reflected and included in the Final Bill in accordance with the provisions of Clause 52.1.2 hereof shall be deemed to have been waived by the Contractor. Further the Owner shall have no liability in respect thereof and the Contractor shall not be entitled to raise or include in the Final Bill any claim(s) other than a notified claim conforming in all respects and in accordance with the

provisions of Clause 52.1.2 hereof.”

9. Mr. Ankit Parhar, learned counsel for the respondent, submits that the claims that the petitioner seeks to refer to arbitration, have not been notified in accordance with Clause 52.1.2. As such, he submits, that the claims are not arbitrable, within the meaning of Clause 52.2.1 of the GCC.

10. Mr. Ankur Singhal, learned counsel for the petitioner, while candidly acknowledging that no specific notice, in the strict terms of Clause 52.2.1 may have been issued by his client to the respondent, urges there was a series of communications between them, during the course of which there has also been partial admission, by the respondent, of the claims of the petitioner. He has invited my attention to the following series of communications between the petitioner and the respondent:

“E-mail dated 29th March, 2019 from the petitioner to the respondent

Subject: Request to Takeover welcome House and Villa 11 Nos. Villas out of 14Nos.

Dear Sir,

As you are aware that we have executed and complete electrical work in all respect at above subject cited areas., your Hotel was also open on 24th March.

Hence you are requested following:

1. Depute your operation team to operate the system.

2. Confirmation of Cable Tag as per our mail dated 28.03.2019 enabling to supply/fixing at site.
3. Snag List if any for above areas.
4. Issue us take over certificate of Welcome House and 11 Nos. Villas.

Hope you will do the needful at earliest.

With Best Regards

Shrikant Tyagi

E-mail dated 18th April, 2019 from the respondent to petitioner

Subject: Re: Request to Takeover welcome House and Villa 11 Nos. Villas out of 14Nos.

Dear Jitin,

As we discussed at site that we to pay 10% against handing over. Please release 5% amount against handing over for welcome house. Remaining 5% we'll release after taking over this building by Taj.

Thanks with Regards

Dharm Veer Maurya

Manager MEP

Darrameks Hotels & Developers Pvt. Ltd.

E-mail dated 22nd June, 2019 from the respondent to petitioner

Subject: Re: Request to provide Front at Villa No. 2P, 12, 13 and 14, Take over the project and release of our outstanding payment along with payment against Handover

Dear Shrikant Ji,

We're working on handing over part and update you soon.

Thanks with Regards

Dharm Veer Maurya

Manager MEP
Darrameks Hotels & Developers Pvt. Ltd.

E-mail dated 4th October, 2019 from the petitioner to respondent

Subject: Request to release of Payment

Dear Sir,

As you are aware that we were raised RA-15 in March 2019 and payment for the same was received in pieces upto end of June. After that we have raised RA-16 in the month of September, i.e. after six months.

You are also aware that project has been completed and are in operation and since March and as on date total outstanding is more than one crore.

As discussed Regarding Handover and confirm by your goodself that DLP will start from first week of October, kindly issue takeover certificate and release at least 50 Lacs on priority basis as a breathing amount to us.

With Best Regards
Shrikant Tyagi

E-mail dated 4th October, 2019 from the respondent to petitioner

Subject: RE: Request to release of Payment

Hello Mr Shrikant Ji

We understand your position, we are planning to make the payments by coming Tuesday or Wednesday,

Thanks

T S Rawat
Darrameks Hotels

E-mail dated 22nd October, 2019 from the petitioner to respondent

Subject: RE: Request to release of Payment of Rs. 75 Lacs on account payment

Hello Nitin

Can you share account statement to see exact payable.

Thanks

TSRawat
Darrameks Hotels

E-mail dated 22nd October, 2019 from the respondent to the petitioner

Subject: Re: Request to release of Payment of Rs. 75 Lacs on account payment

Sir,

It was shared by Shrikant in last month also and all the reconciliation was done with Kuldeep ji.

Pls. advice Kuldeep ji to share you the details for the same.

Thanks & Regards,
Nitin Pratap Singh,
Director,
Brilltech Engineers Pvt. Ltd.

E-mail dated 1st November, 2019 from the petitioner to respondent

Subject: RE: Request to release of outstanding Payment of Rs. 79.34 Lacs

Dear Sir,

Refer to the trailing mail and discussions, we wish to inform you that we have delivered and install the required meters and wire for balance point wiring work in 3 No. villas.

Now balance supply at our end is only cable for external lighting and GI strip which is additional requirement for HVAC Starters etc.

We request you to kindly provide certified copy of our RA-16 dated 23.09.2019 and release our outstanding payment Amounting Rs. 7934208.00 as per attached payment summery.

As you are aware that project was start on June 2105 with completion period of 18 Months i.e. December 2016 and project over run more than 3 years thereafter. Please also note that hotel was open in the month of March 2019 and now balance work at villa is only fixing of switch sockets and approx. 1000Mtr. external cable which is pending due to non-availability of front i.e. final painting etc. at villas. Hence you are requested to kindly provide us the takeover certificate as assured by your goodself during meeting in the month of September.

Hope you will do the needful and release our outstanding payment and take over certificate.

With Best Regards
Shrikant Tyagi

E-mail dated 7th November, 2019 from the petitioner to respondent

Subject: RE: Request to release of outstanding Payment of Rs. 79.34 Lacs

Dear Sir,

Refer to the trailing mail, we are awaiting the certified copy of RA-16 dated 23.09.2019 and balance outstanding Payment amounting Rs. 7934208.00

Request you to kindly look into the same and release payment and copy of Certified RA16.

With Best Regards

Shrikant Tyagi

E-mail dated 8th November, 2019 from the respondent to the petitioner

Subject: Re:Request to release of outstanding Payment of Rs. 79.34 Lacs

Dear Anurag,

Please note that handing over process is going on. Vendor has submitted as build drawings to us. Please process the bills for 95% in this RA. Retention amount (5%) has to be deducted from it.

Thanks with Regards

Dharm Veer Maurya
885906720
ManagerMEP
Darrameks Hotels & Developers Pvt. Ltd.

E-mail dated 8th November, 2019 from the petitioner to the respondent

Dharamveer Ji,

Kindly confirm the handing over %age release of Brilltech 16th RA bill.

Regards

Anurag Bansal
IM Cost Management Pvt Ltd.

E-mail dated 8th November, 2019 from the petitioner to the respondent

Subject: RE: Taj Rishikesh: COP-16 against RA-16 of Brilltech Engineers

Dear Dharamveer Ji,

PFA the certified RA bill-16 of M/s Brilltech Engineers of Electrical works for your reference & further necessary action.

Kindly check the payment status before releasing the payment.

Regards
Anurag Bansal
IMCost Management Pvt. Ltd.

E-mail dated 12th November, 2019 from the petitioner to respondent

Subject: RE: Taj Rishikesh: COP-16 against RA-16 of Brilltech Engineers

Dear Sir,

Refer to your trial mail, certified Bill RA-16 is accepted, however the following observations / request are as under:

1. You have not considered Labour Cess 1% in COP, whereas it is certified in summary of RA-16 Line No. 37 Amounting Rs. 435127.00
2. You have not considered the difference in rates of panels (Amounting Rs. 1.68 Lacs), whereas it was discussed so many times and we were submitted the rate analysis for the same as advised by your goodself.
3. You have not considered 1% amount approx. Rs. 3.71 Lacs against As Built Drawings, whereas As built drawings has been submitted in the month of Sep. - 2019 at site
4. You have Hold 5% Amount against Handover, whereas it was confirm by your goodself that handover should be treat from 1st week of October 2019 based on our request that the system is since march 2019 and formal handover process could not done due to non-availability of your / TAJ team members.

5. As requested during visit in October 2019 at site to submit corporate guarantee against retention money Amounting Rs. 18.59 Lacs, As per Certified COP.

Request you to kindly confirm per return to submit Corporate Guarantee and release our outstanding payment as per attached Detail along with above indicated Payments.

Hope you will do the needful and release our outstanding payment ASAP.

With Best Regards
Shrikant Tyagi

E-mail dated 31st December, 2019 from the respondent to the petitioner

Subject: RE: Submission of FINAL BILL for certification, request to issue take over letter and relase of outstanding payment.

Dear Anurag,

Please process bill for further. Let me know in case any requirement from us.

Best Regards,

Dharm Veer Maurya
Chief Engineer
Taj Rishikesh Resort & Spa, Uttarakhand Singthali,
Rishikesh - Devprayag Road,
Distt. Tehri Garhwal. Uttarakhand, 249192 India
+911378262671 M:9410010750 I Tajhotels.com

E-mail dated 14th February, 2020 from the petitioner to the respondent

Subject: Submission of signed copy of Guarantee, Handover certificates and CPBG along with Cheque

Dear Sir,

Refer to our mail dated 7th Feb. 2020 and discussion undersigned with your good self, please find attached signed copy of Guarantee Certificate, Handover Certificate and Corporate Bank Guarantee along with Blank cheque of same amount of CPBG.

Hope you will find the same in line with requirement and release our balance outstanding as per our final bill submitted and verified to your officials and IMCM representative at site on 7th and 8th Feb. 2020 at site.

Hard copy of the same shall submit during visit at site for installation of Photocell and Energy Meters in next 3-4 days

With Best Regards

Shrikant Tyagi
DGM-Projects
Brilltech Engineers Pvt. Ltd.
Plot No. 58, Ecotech-12, Noida Extn. -201310,
Delhi NCR, INDIA
Mobile:- +91-995831816
Email: shrikant@brilltech.co.in
Website: www.brilltech.co.in”

11. There is no doubt that there has been a series of communications, between the petitioner and the respondent, in connection with the claims of the petitioner. At the same time, I am not able to convince myself that these communications can suffice to constitute notification of the said claims, in accordance with the protocol set out in the various sub-clauses of Clause 52.1 of the GCC. It is seen that Clause 52.1.1 and Clause 52.1.2 prescribed a rigorous discipline, to be followed, in the matter of notification of claims. The contractor is required to give notice in writing of his claim within 10 days from the date of issue of orders or instructions relating to the works for which additional payment of compensation is sought. This

notice is required to contain full particulars of the nature of claim, the grounds on which it is based and the amount claimed. The notice is required to be addressed to the Project Manager and the owner of the respondent. Clause 52.1.2 requires any such notified claims, which remain unpaid at the time of preparation of the final bill by the contractor, to be separately included in the final bill in the form of a statement of claim attached thereto, giving particulars of the nature of the claim, grounds on which it is based and the amount claimed, supported by copies of the notices sent in respect thereof by the contractor to the Project Manager and owner under Clause 52.1.1. Clause 52.2.1 provides for arbitration only of notified claims, included in the final bill in accordance with the provisions of Clause 52.1.2.

12. The petitioner has filed a rejoinder, to the counter affidavit of the respondent, which raises the specific contention that the claims of the petitioner, which the petitioner seeks to be referred to arbitration, have not been notified in accordance with Clause 52.1.1, and no statement of claim, in accordance with Clause 52.1.2, has been issued in respect thereof. There is no traversal, of this contention, in the rejoinder filed by the petitioner. Even during oral arguments, Mr. Singhal, while acknowledging that the strict discipline of Clauses 52.1.1 and 52.1.2 may not have been followed by his client, nevertheless submits that the prayer, of his client, to refer the disputes to arbitration, ought not to be rejected on this ground, as the communications between the petitioner and the respondent indicate that the respondent had acknowledged the tenability of the petitioner's claims.

13. Reference of claims to arbitration can be made, by the Court, under Section 11, only if the claims are themselves arbitrable, in accordance with the Arbitration Agreement between the parties. The claims of the petitioner not having been notified, and no statement of claim having been submitted, in that regard, in accordance with the protocol set out in Clauses 52.1.1 and 52.1.2, cannot be regarded as arbitrable within the meaning of Clause 52.2.1 of the GCC.

14. This issue is no longer *res integra*, having been concluded by several decisions, of which the following have been relied upon, by the learned counsel for the respondent:

(i) ***Institute of Geoinformatics (P) Ltd. v. Indian Oil Corporation Ltd.***¹ (the SLP against which was also dismissed by the Supreme Court²),

(ii) ***International Building and Furnishing Co. (Cal) Pvt. Ltd. v. Indian Oil Corporation Ltd.***³, and

(iii) ***Srico Projects Pvt. Ltd. vs. Indian Oil Foundation***⁴ (the SLP against which was also dismissed by the Supreme Court⁵).

15. These decisions hold, in one voice, that where the arbitration agreement contemplates arbitration only of notified claims, claims, which are not notified in accordance with the procedure stipulated, in that regard, in the agreement between the parties, cannot be referred to

¹ 2015 SCC OnLine Del 9562

² SLP (C) No. 23055/2015Hey

³ 1995 (32) DRJ 354 (DB)

⁴ 2017 SCC OnLine Del 6446

⁵ SLP (C) No. 14976/2017

arbitration.

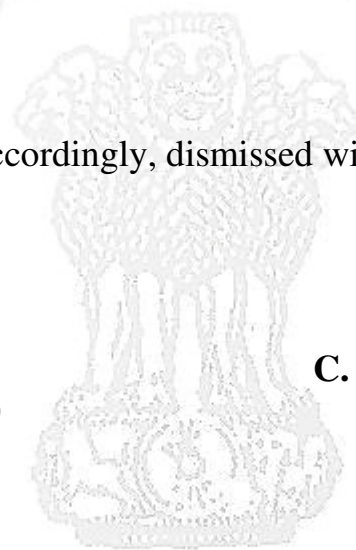
16. In view thereof, the prayer of the petitioner, to refer the petitioner's claims to arbitration, cannot sustain.

17. Needless to say, this Court has not expressed any view on the maintainability on the merits of the claims of the petitioner, which would remain open for agitation by the petitioner, by recourse to any such other remedies as may be available to the petitioner in accordance with law.

18. The petition is, accordingly, dismissed with no order as to costs.

NOVEMBER 19, 2020
r.bararia

C. HARI SHANKAR, J.



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