

\$~13, 14, 15 and 16

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

Decided on 5th November, 2020

+ ARB.P. 338/2020
+ ARB.P. 339/2020
+ ARB.P. 340/2020
+ OMP(I)(COMM) 326/2020

M/S HERITAGE CONSERVATORS THROUGH: ITS
PROPRIETOR MR. GURPREET SINGH Petitioner
Through: Mr. Sanjay Bansal, Adv.

Versus

ESPIRE RESORTS PRIVATE LIMITED
(FORMERLY KNOWN AS COSMOS
BUILDWELL PRIVATE LIMITED) Respondent
Through: Mr. Sacchin Puri, Sr. Advocate
with Ms. Mahjabeen, Mr.
Brijesh Chaudary, Ms. Pooja
Rani, Mr. Kamil Khan and Mr.
Sandeep Kumar, Advs.

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

JUDGEMENT (ORAL)

% **05.11.2020**

(Video-Conferencing)

C .HARI SHANKAR, J.

ARB.P. 338/2020, ARB.P. 339/2020 and ARB.P. 340/2020

1. These three petitions, under Section 11(6) of the Arbitration and
ARB.P. 338/2020 & conntd. matters

Page 1 of 15

Signature Not Verified

Digitally Signed By: SUNIL
SINGH NEGI

Signing Date: 09.11.2020
19:13:44

Conciliation Act, 1996, seek reference of disputes between the petitioner and the respondent, which are interconnected and cognate in nature, to arbitration by a sole arbitrator. Mr. Sacchin Puri, learned Senior Counsel for the respondent, is agreeable to the disputes being referred to a single arbitrator, as they are interconnected.

ARB.P. 338/2020

1. This arbitration petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “1996 Act”), prays for appointment of an arbitrator to arbitrate on the disputes between the parties.

2. Tenders were invited, by the respondent, for repair/conservation work at a hotel proposed to be constructed on the Chouth Ka Barwara, Sawai Madhopur, Rajasthan. The bid of the petitioner was accepted, resulting in an offer dated 18th July, 2016, followed by Letter of Intent dated 18th August, 2016. The total value of the contract was ₹ 4,64,08,300/-, excluding service tax.

3. Three further work orders were issued by the respondent to the petitioner, for carrying out additional items of work.

4. The petitioner asserts that the work, as contracted, was completed by it, but that the respondent defaulted in releasing the payments to the petitioner. It is averred, in the petition, that an amount of ₹ 2,04,71,067/-, exclusive of GST, is due to be paid by the

respondent to the petitioner. A grievance has also been ventilated, in the petition, regarding the alleged change in the scope of the work having been affected by the respondent midway, which, according to the petitioner, resulted in delay in completing the contracted work.

5. As a result, it is averred that arbitrable disputes have arisen between the parties which are required, as per Clause 44 of the Letter of Intent dated 18th August, 2016, which is common to all the work orders issued to the petitioner, to be referred to arbitration. The said Clause reads thus:

“ARBITRATION

In the event that any dispute arises between the parties out of or related to the provision to the order, either party may give notice to the other party of its intention to submit the issues specified in such notice. Either party may thereafter submit the unresolved issue to arbitration. Arbitration shall be held in accordance with the Arbitration and Conciliation Act 1996 by a sole Arbitrator to be Appointed by “COSMOS BUILDWELL PVT. LTD.” The venue of the arbitration shall be New Delhi. The award will be final and binding between the parties.”

6. The disputes, which the petitioner seeks to refer to arbitration, have been set out thus, in para 15 of the petition:

“Claim for release of Balance payments towards work done: Rs.154,66,167/- without GST and GST @ 18% for value of Rs.27,33,927/- subject to Invoice to be raised.

Claim for interest @18% p.a on this amount of 15466167/- from the date of submission of bills till date of release of payments.

Claim for release of Retention amount of Rs.2414424/- as

deducted from R/A Bills.

Claim for Interest on delay in release of payments for running bills, as stipulated time was 28 days for release of payments from the date of submission of bill, but respondents had failed to release the payments within stipulated period, hence claimants are entitled to claim interest @ 18% from the date of submission of running bill till date of release of payments: Rs.3448505/-.

Claim for payment for the work of three sided North Boundary wall for Value of Rs.52,78,371/-, for which the bill was submitting upto 17th R/A bill, but the payments were not released and had withhold the payments which was released against the work of Boundary wall upto 14th R/A Bill. Further interest @ 18% p.a is claimed on this amount from the date of amount released was hold and further from the date of submission of 17th R/A bill.

Claim for Damages under Doctrine of Damages and Mitigation of Losses due to delay and prolongation of work period beyond stipulated period i.t after 01.02.2018 till 25.07.2020 i.e about 30 months @ Rs 198500/- Per month towards establishment, infrastructure and over heads: Rs 5955000/-.

Claim for escalation in the material as well as Labour cost on the amount of work done beyond stipulated period @ 15% on an average which comes to Rs.58,12,455/-.

Claim for Loss of profit @ 15% on the value of work remained unexecuted at site which is taken at 15% of One Crore which comes to Rs 15 lacs only.

Claim for interest @ 18% p.a on all above claims for pre-reference, Pendent lite and future period and cost of Arbitration. Claimants had already asked for release of all our legitimate payments along with interest @ 18% p.a towards work done in scores of letters and also informed that in case of non-release of payments he shall take recourse to legal actions.

Claim for cost of arbitration and other legal and litigation expenses as per actual is claimed in the present arbitration.”

7. *Vide* letter, dated 29th July, 2020, addressed to the respondent, the petitioner invoked the afore-extracted Clause 44 of the Letter of Intent, and sought reference its claims for arbitration.

8. On 24th August, 2020, the respondent wrote to the petitioner, stating that, *vide* letter dated 18th August, 2020, the respondent had appointed an arbitrator to arbitrate on the disputes raised by the petitioner.

9. The petitioner has approached this Court, under Section 11(6) of the 1996 Act, citing the judgment of the Supreme Court in ***Perkins Eastman Architects DPC v. HSCC (India) Ltd¹***, as well as Section 12(5) of the 1996 Act, to contend that the respondent could not be empowered to appoint any arbitrator to arbitrate on the disputes, raised by the petitioner.

10. Consequent to issuance of notice, a reply, to this petition, was filed by the respondent, in which the applicability of Section 12(5) of the 1996 Act and the decision of the Supreme Court in ***Perkins Eastman Architects DPC¹***, has been contested on the ground that, by writing on 29th July, 2020, to the respondent, requesting the respondent to appoint an arbitrator, the petitioner had effectively waived its right under Section 12(5) of the 1996 Act.

11. This contention, submits Mr. Sanjay Bansal, learned counsel for

¹ 2019 SCC Online SC 1517

the petitioner, is not correct in law and cites in that regard, the recent decision of this Court in *JMC Projects (India) Ltd. v. Indure Private Ltd*², in which this Court went into the issue of waiver of Section 12(5) of the 1996 Act, and held that the proviso to Section 12(5) required *express waiver* of the applicability of the said provision.

12. In view thereof, Mr. Sacchin Puri, learned Senior Counsel appearing for the respondent, on instructions, very fairly submits that he did not seek to join issue on this aspect and that the disputes raised by the petitioner could be referred to adjudication to a learned retired Judge of this Court. He only submits that his rights to raise counter-claim(s), before the learned sole arbitrator, should remain reserved.

13. In view thereof, the aforesaid disputes, raised by the petitioner, stands referred to the arbitration of Hon'ble Mr. Justice Kailash Gambhir, a learned retired Judge of this Court and an experienced arbitrator. The address and mobile number of the learned arbitrator are W-67, Greater Kailash Part -I, New Delhi-110048 and 9871300033 respectively.

14. The parties are directed to contact the learned sole arbitrator, as per the aforesaid contact details, within two days, so that the willingness of the learned sole arbitrator could be ascertained and schedule of arbitration could be drawn up.

15. The learned sole arbitrator would furnish the requisite

disclosure under Section 12 of the 1996 Act within a week or entering on the reference.

16. The right of the respondent, to raise counterclaims before the learned sole arbitrator, in accordance with law, stands reserved.

17. The learned sole arbitrator would be entitled to charge fees in accordance with the Fourth Schedule to the 1996 Act.

18. This petition is disposed of accordingly.

ARB.P. 339/2020

1. This is an arbitration petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “1996 Act”), which prays for appointment of an arbitrator to arbitrate on the disputes between the parties.

2. The dispute between the parties relates to a work order, dated 19th April, 2018, issued by the respondent to the petitioner, for casting and finishing of a dome for Fort Barwara resort at Chouth Ka Barwara Sawai Madhopur, Rajasthan. Urging that, despite completion of work, several payments remained to be released by the respondent to the petitioner, it is asserted that arbitrable disputes had arisen between the parties. Clause 43 of the Letter of Intent/work order, which provides for arbitration to resolve disputes between the parties, reads thus:

“ARBITRATION

In the event that any dispute arises between the parties out of or related to the provision to the order, either party may give notice to the other party of its intention to submit the issues specified in such notice. Either party may thereafter submit the unresolved issue to arbitration. Arbitration shall be held in accordance with the Arbitration and Conciliation Act 1996 by a sole Arbitrator to be Appointed by “ESPIRE RESORTS PVT. LTD.” The venue of the arbitration shall be New Delhi. The award will be final and binding between the parties.”

3. The petitioner has set out its claim against the respondent, thus, in para 16 of the petition:

“Claim for release of Balance payments towards work done: Rs.930525/- without GST and GST of Rs 97186/- @ 18% on Rs 539920/- subject to Invoice to be raised.

Claim for interest @18% p.a on this amount of 930525/- from the date of submission of bills till date of release of payments.

Claim for release of Retention amount of Rs.342502/- as deducted from R/A Bills.

Claim for Interest on delay in release of payments for running bills @18% from the date of submission of running bill till date of release.

Claim for payment for the work of water proofing on domes: Rs 780,000/-.

Claim for increased rates for the value of work done beyond Stipulated date of completion as well as beyond the stipulated contractual value for an amount of Rs 7 lacs approximately. (to be calculated)

Claim for Damages under Doctrine of Damages and Mitigation of Losses due to delay and prolongation of work period beyond stipulated period i.e after 18.06.2018 till 28.02.2019 @ Rs 40,000/- Per month towards establishment, infrastructure and over heads: Rs 320000/-.

Claim for interest @ 18% p.a on all above claims for pre-

reference, Pendent lite and future period.

Claim for cost of arbitration and other legal and litigation expenses as per actual is claimed in the present arbitration.”

4. *Vide* letter dated 29th July, 2020, the petitioner invoked the afore-extracted Clause 43 of the Letter of Intent, and sought reference of the claims of the petitioner to arbitration.

5. On 24th August, 2020, the respondent wrote to the petitioner, stating that, *vide* letter, dated 18th August, 2020, the respondent had appointed an arbitrator to arbitrate on the disputes raised by the petitioner.

6. The petitioner has approached this Court, under Section 11(6) of the 1996 Act, citing the judgment of the Supreme Court in ***Perkins Eastman Architects DPC^l***, as well as Section 12(5) of the 1996 Act, to contend that, in view thereof, the respondent could not be empowered to appoint any arbitrator to arbitrate on the disputes raised by the petitioner.

7. Consequent to issuance of notice, a reply, to this petition, was filed by the respondent, in which the applicability of Section 12(5) of the 1996 Act and the decision of the Supreme Court in ***Perkins Eastman Architects DPC^l***, has been contested on the ground that, by writing on 29th July, 2020, to the respondent, requesting the respondent to appoint an arbitrator, the petitioner had effectively waived its right under Section 12(5) of the 1996 Act.

8. This contention, submits Mr. Sanjay Bansal, learned counsel for the petitioner, is not correct in law and cites, in that regard, the recent decision of this Court in *JMC Projects (India) Ltd.*², in which this Court went into the issue of waiver of Section 12(5) of the 1996 Act, and held that the proviso to Section 12(5) required *express waiver* of the applicability of the said provision.

9. In view thereof, Mr. Sacchin Puri, learned Senior Counsel appearing for the respondent, on instructions, very fairly submits that he did not seek to join issue on this aspect and that the disputes raised by the petitioner, could be referred to adjudication to a learned retired Judge of this Court. He only submits that his rights to raise counterclaim(s) before the learned sole arbitrator, should be reserved.

10. In view thereof, the aforesaid disputes, raised by the petitioner, stand referred to the arbitration of Hon'ble Mr. Justice Kailash Gambhir, a learned retired Judge of this Court and an experienced arbitrator. The address and mobile number of the learned arbitrator are W-67, Greater Kailash Part -I, New Delhi-110048 and 9871300033 respectively.

11. The parties are directed to contact the learned sole arbitrator, as per the aforesaid contact details, within two days, so that the willingness of the learned sole arbitrator could be ascertained and schedule of arbitration could be drawn up.

12. The learned sole arbitrator would furnish the requisite

disclosure under Section 12 of the 1996 Act within a week or entering on the reference.

13. The right of the respondent, to raise counter-claims before the learned sole arbitrator, in accordance with law, stands reserved.

14. The learned sole arbitrator would be entitled to charge fees in accordance with the Fourth Schedule to the 1996 Act.

15. This petition is disposed of accordingly.

ARB.P. 340/2020

1. This is an arbitration petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “1996 Act”), prays for appointment of an arbitrator to arbitrate on the disputes between the parties.

2. The dispute between the parties relates to a work order, dated 1st August, 2019, issued by the respondent to the petitioner, for works to be carried out at Chouth Ka Barwara Sawai Madhopur, Rajasthan. The petitioner alleges that the respondent has defaulted in making payments against works carried out by it, resulting in arbitrable disputes having arisen between the petitioner and the respondent. Clause 43 of the Letter of Intent/work order, which provides for arbitration, to resolve disputes between the parties, reads thus:

“ARBITRATION

In the event that any dispute arises between the parties out of or related to the provision to the order, either party may give notice to the other party of its intention to submit the issues specified in such notice. Either party may thereafter submit the unresolved issue to arbitration. Arbitration shall be held in accordance with the Arbitration and Conciliation Act 1996 by a sole Arbitrator to be Appointed by “ESPIRE RESORTS PVT. LTD.” The venue of the arbitration shall be New Delhi. The award will be final and binding between the parties.”

3. The petitioner has set out its claim against the respondent, thus, in para 16 of the petition:

“Claim for release of Balance payments towards work done: Rs.2075888/- without GST and GST of Rs 373659/- @ 18% on Rs 2075888/- subject to Invoice to be raised.

Claim for interest @18% p.a on this amount of 2075888/- from the date of submission of bills till date of release of payments.

Claim for release of Retention amount of Rs.61147/- as deducted from 01st R/A Bill.

Claim for Interest on delay in release of payments for running bills, Please appreciate that the stipulated time was 28 days for release of payments from the date of submission of bill, but Respondents had failed to release the payments within stipulated period, hence claimants are entitled to claim interest @18% from the date of submission of running bill till date of release of payments.

Claim for interest @ 18% p.a on all above claims for pre-reference, Pendent lite and future period and cost of Arbitration. Claimants had already asked for release of all our legitimate payments along with interest @ 18% p.a towards work done in scores of letters and also informed that in case of non-release of payments claimants shall take recourse to legal actions.

Claim for cost of arbitration and other legal and litigation expenses as per actual is claimed in the present arbitration.”

4. Vide letter, dated 29th July, 2020, the petitioner invoked the afore-extracted Clause 43 of the Letter of Intent, and sought reference of the claims of the petitioner to arbitration.

5. On 24th August, 2020, the respondent wrote to the petitioner, stating that, *vide* letter, dated 18th August, 2020, the respondent had appointed an arbitrator to arbitrate on the disputes raised by the petitioner.

6. The petitioner has approached this Court, under Section 11(6) of the 1996 Act, citing the judgment of the Supreme Court in ***Perkins Eastman Architects DPC^I***, as well as Section 12(5) of the 1996 Act, to contend that, in view thereof, the respondent could not be empowered to appoint any arbitrator to arbitrate on the disputes, raised by the petitioner.

7. Consequent to issuance of notice, a reply, to this petition, was filed by the respondent, in which the applicability of Section 12(5) of the 1996 Act and the decision of the Supreme Court in ***Perkins Eastman Architects DPC^I***, has been contested on the ground that, by writing on 29th July, 2020, to the respondent, requesting the respondent to appoint an arbitrator, the petitioner had effectively waived its right under Section 12(5) of the 1996 Act.

8. This contention, submits Mr. Sanjay Bansal, learned counsel for the petitioner, is not correct in law and cites in that regard, the recent

decision of this Court in *JMC Projects (India) Ltd.*², in which this Court went into the issue of waiver of Section 12(5) of the 1996 Act, and held that the proviso to Section 12(5) required *express waiver* of the applicability of the said provision.

9. In view thereof, Mr. Sacchin Puri, learned Senior Counsel appearing for the respondent, on instructions, very fairly submits that he did not seek to join issue on this aspect and that the disputes raised by the petitioner could be referred to adjudication to a learned retired Judge of this Court. He only submits that his rights to raise counter-claims before the learned sole arbitrator, should be reserved.

10. In view thereof, the aforesaid disputes, raised by the petitioner, stand referred to the arbitration of Hon'ble Mr. Justice Kailash Gambhir, a learned retired Judge of this Court and an experienced arbitrator. The address and mobile number of the learned arbitrator are W-67, Greater Kailash Part -I, New Delhi-110048 and 9871300033 respectively.

11. The parties are directed to contact the learned sole arbitrator, as per the aforesaid contact details, within two days, so that the willingness of the learned sole arbitrator could be ascertained and schedule of arbitration could be drawn up.

12. The learned sole arbitrator would furnish the requisite disclosure under Section 12 of the 1996 Act within a week or entering on the reference.

13. The right of the respondent, to raise counter-claims before the learned sole arbitrator, in accordance with law, stand reserved.

14. The learned sole arbitrator would be entitled to charge fees in accordance with the Fourth Schedule to the 1996 Act.

15. This petition is disposed of accordingly.

OMP(D)(COMM) 326/2020

1. In view of the fact that the disputes between the parties stand referred to the arbitration of Hon'ble Mr. Justice Kailash Gambhir, a retired Judge of this Court, by the present order, learned counsel for the parties are *ad idem* that the learned Sole Arbitrator may be requested to decide this petition, treating it as an application under Section 17 of the 1996 Act.

2. The request is justified. Ordered accordingly.

3. This petition stands disposed of.

C. HARI SHANKAR, J.

NOVEMBER 5, 2020

r.bararia