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

Date of Decision: 15.03.2021

+ ARB.P. 644/2020

M/S ORIENTAL STRUCTURAL ENGINEERS PVT LTD

..... Petitioner

Through: Mr. Anil Kumar Airi, Senior
Advocate with Mr. Ravi Kishan
Chandna, Mr. Manit Moorjani and
Mr. Mudit Ruhella, Advocates.

versus

M/S SEVEN HILLS PROJECT PRIVATE LIMITED Respondent

Through: Mr. Krishna Kumar, Mr. Parijat
Kishore and Mr. Abhay Singh,
Advocates.

+ ARB.P. 658/2020

M/S ORIENTAL STRUCTURAL ENGINEERS PVT LTD

..... Petitioner

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versus

M/S SEVEN HILLS PROJECT PRIVATE LIMITED Respondent

Through: Mr. Krishna Kumar, Mr. Parijat
Kishore and Mr. Abhay Singh,
Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

SANJEEV NARULA, J. (Oral):

1. The present petitions under Section 11(6) of the Arbitration and Conciliation Act, 1996, seek appointment of a Sole Arbitrator.

PETITIONER'S CONTENTIONS

2. The case of the Petitioner is that the Respondent has been working as a sub-contractor in respect of the following Work Orders –

- A. Work Order No. OSE/NSBP/SC-W0/2015-16111 dated 23rd July, 2015 towards special repair works towards Nagpur Betul Road project. (Giving rise to ARB.P. 644/2020).
- B. Work Order No. OSE/C/NBP-F/SC-W0/007 dated 19th September, 2015 towards embankment and subgrade construction for Nagpur Bypass road project. (Giving rise to ARB.P. 658/2020).

3. It was agreed between the parties that the bills raised under the Work Orders shall be verified and certified at the time of completion of Works and submission of the Final Bill, for which, the Respondent had to submit measurements and necessary records. According to the Petitioner, the Respondent has failed to perform its obligations under the afore-noted Work Orders. It had to submit the royalty challans as contemplated under Clauses 8.09 (Taxes, Duties, Royalty etc.) and 10.09 of the Work Order for finalization of the Final Bill. In absence of the requisite documents, the

Petitioner was left with no option but to prepare and reconcile the accounts on the basis of the records at site. The said accounts cannot be considered to be final, because the royalty challans and other government dues that were to be furnished by the Respondent, have not been accounted for. In a nutshell, according to the Petitioner, the Respondent has: (a) made false representations to the Petitioner; (b) has not submitted true and correct statement of accounts and reports; (c) is in receipt of an excess amount to the tune of Rs. 71,27,414/- over and above the certified payments under the Work Order dated 19th September, 2015, for which ARB. P 658/2020 has been filed; and moreover, (d) the Respondent has made a fraudulent claim of Rs. 25,44,86,464/- under various Work Orders. The Petitioner further contends that the Respondent, with the intention to force the Petitioner to accede to its unlawful demands, issued a demand notice dated 23rd September, 2019 under Section 8 of the Insolvency and Bankruptcy Code, 2016 [*hereinafter referred to as 'the IBC'*].

4. In this background, the Petitioner, *vide* letter dated 8th January, 2020, invoked the Settlement of Disputes clause as envisaged under Clause 9.04 of Work Order. The said clause also contains the Arbitration Agreement between the parties, which reads as under:

“Settlement of Disputes: Any Dispute arising out of this Sub Contract shall be settled amicably through the Project head of OSEPL within the terms of this Sub Contract. In case of failure to settle amicably within 30 days of a request to this effect from either party to other, the Dispute shall be finally resolved in accordance with the Arbitration & Conciliation Act 1996 by sole arbitrator to be nominated (including nomination of replacement Arbitrator, if necessitated by vacancy of the post caused by any reason whatsoever) by the Managing Director of OSEPL, New Delhi. The Managing Director of OSEPL shall

nominate the Arbitrator within 30 days of receiving a request to this effect from either party. In case no such nomination is made by the Managing Director within the stipulated time period of 30 days, then the Director (Technical) of OSEPL, New Delhi shall act as the Arbitrator for adjudicating the Dispute. The venue of arbitration shall be New Delhi.”

5. Since disputes have arisen between the parties, the same are required to be adjudicated in terms of the Arbitration Agreement. The arbitration clause is in conflict with the judgment of the Supreme Court¹, as it gives a unilateral right to the Managing Director of the Petitioner to make an appointment. In these circumstances, the present petition has been filed before this Court seeking appointment of an independent Arbitrator.

RESPONDENT’S CONTENTIONS

6. The counsel for the Respondent has contested the present petition on several grounds. His argument can be summarized as follows: (i) that there is no genuine dispute between the parties; (ii) the procedure for seeking appointment of an Arbitrator has not been followed; (iii) the present petition is an abuse of the process of the Court; and iv) the Petitioner has initiated the present proceedings in order to circumvent the proceedings under the IBC.

7. Elaborating on these submissions, Mr. Krishna Kumar, learned counsel for the Respondent, submits that while the Respondent does not dispute the Work Orders in question, however, there is no dispute between the parties arising under the afore-noted Work Orders. He avers that, besides the Work

¹ *Perkins Eastman Architects DPC and Ors. v. HSCC (India) Ltd.*, AIR 2020 SCC 59.

Orders, there are independent and ongoing transactions between the parties arising out of mining contracts. The said mining contracts neither have an arbitration clause, nor are the same in any way connected to the road construction and the afore-noted two Work Orders. With respect to the Work Order for road construction, the work has been carried out in accordance with the specifications provided therein and the quality of the work done was according to the standards and the project was completed by the Respondent on time and there has been no allegation of any defect or deficiency in the construction of the road under the said project. The Respondent has furnished Final Bills for an amount of Rs. 19,47,49,331/- with regard to NH-69 and with respect to NH-7, the approved amount of Rs. 10,86,80,109/-. He submits that the bills have been duly accepted, payments recommended and approved by the Project Officer. The value of the work done has also been approved and the amount stated in the bills has been accepted for payment. Consequently, a total amount of Rs. 25,44,86,464/-, due and payable by the Petitioner has been, deliberately withheld without any justifiable reason. He also denies the allegation that payment of excess monies was made by the Petitioner to the Respondent in respect of any claim whatsoever. In this regard, Mr. Kumar refers to a letter dated 16th August, 2019 issued by the Petitioner, in reply to the Respondent's demand notice dated 19th July, 2019. In the said reply, the Petitioner has denied the claims of the Respondent regarding outstanding dues, and pertinently, has not claimed any refund from the Respondent. He further relies upon the demand notice dated 23rd September, 2019 issued by the Respondent under the IBC. It is pointed out that in response Petitioner *vide* reply dated 7th October, 2019, specifically denied the claim and in order to withhold payment, sought

details that were in fact already part of the record. The procedure for referring the matter to arbitration has not been followed and the present petition is therefore liable to be rejected on this ground. The disputed settlement clause in the Work Orders (extracted above) consists of two parts, the first one sets out the agreement between the parties to amicably settle the dispute and the second one deals with the reference of the disputes to arbitration. The Petitioner's letter dated 8th January, 2020 mentions the amicable settlement and does not express the intent of the Petitioner to refer the matter to arbitration. The other letter of the Petitioner, dated 24th January, 2020, is also inadequate as it too does not purport to refer the matter to arbitration. Thus, in absence of any letter issued by the Petitioner invoking the arbitration clause, and on account of lack of invocation of the arbitration clause, the present petition should not be entertained.

8. Mr. Kumar further submits that the petition is an abuse of the process of Court and is an attempt to circumvent the proceedings initiated under the IBC. The conduct of the Petitioner demonstrates that, but for the initiation of the proceedings under the IBC, the Petitioner could not have raised the issue or disputes. From the Petitioner's reply dated 7th October, 2019 as well as the present petition, it is apparent that there is no specific allegation of work not having been performed in terms of the Work Orders. On a perusal of the statement and the ledger provided, it becomes further apparent that the value of the amount payable with regard to the work done is recommended, settled, approved and accepted by the Petitioner. For the first time, the Petitioner has made an allegation that some amounts are due or payable, which are in fact completely unrelated to the Work Orders and pertain to an

entirely different contract relating to mining.

PETITIONER'S REJOINDER

9. In his rejoinder, Mr. Anil Kumar Airi controverts the submissions made by the Respondent. He submits that firstly, there has been no adjustment as contended by the Respondent. Secondly, if the adjustments were done wrongfully, as is contended by the Respondent, the question of adjustment would also be a disputed question which would require adjudication. Mr Airi reiterates that no Final Bills have ever been submitted, and the payment certificates referred to by the Respondent, are interim payment certificates as per Clause 6.01, and not Final Bills. The Respondent had only raised interim bills for work done, in accordance with which payments were realised. Payments against interim bills are mere advances which are subject to adjustment in the Final Bill. All accounts were to be settled in accordance with the terms of the Work Orders dated 23rd July, 2015 and 19th September, 2015 at the time of the submission of the Final Bill. Thus, the liability of the Respondent is still continuing till the Final Bills and documents (pertaining to rates, including royalty, taxes, duties cess etc.) are pending, as the Petitioner can still be exposed to liabilities. Mr. Airi submits that till the time the Respondent submits all the documents as are required under the contract, the accounts cannot be finalised.

10. Next, referring to Clause 9.04 of the Work Orders, Mr. Airi submits that the letter dated 8th January, 2020 invoking arbitration clause is in consonance with the agreement between the parties.

ANALYSIS AND REASONING OF THE COURT

11. The contentions of the parties have been heard at length. At the stage of deciding an application under Section 11, the Court does not have to meticulously examine rival contentions of the parties on the merits of the claim.² These disputed facts have to be adjudicated by way of the alternate dispute resolution mechanism as agreed upon by the parties. The Respondent contends that it has to recover payment from the Petitioner, and the Petitioner on the other hand contends that it has made payment to the Respondent in excess of the work done by it. In the opinion of the Court, this itself is a dispute which requires adjudication by way of arbitration. The argument of the Respondent that there is no *bona fide* dispute between the parties, is therefore, completely misconceived. The test is whether there is existence of an arbitrable dispute, and not whether the dispute is *bona fide* or germane. The judgment³ relied upon by the Respondent is distinguishable on facts, as the contractor therein had issued no-claim certificates and accepted the amount voluntarily, thus leading to the court holding that the contract stood discharged and there was no arbitrable dispute between the parties. As regard the objection relating to invocation of arbitration, the court finds that the letter clearly specifies that in the event an amicable settlement is not arrived at, there will be an invocation of the recourse provided under Clause 9.04, which, upon a single glance of the clause, can only mean an arbitration mechanism. Thus, upon failure of settlement talks, the Petitioner was

² See: *Vidya Drolia v. Durga Trading Corporation*, 2020 SCC OnLine SC 1018.

³ *Union of India v. Master Constructions* (2011) 12 SCC 357.

constrained to take recourse as decided by the parties under Clause 9.04 for appointment of the Arbitral Tribunal. However, as the extant law invalidates the mechanism for nomination of a sole arbitrator as envisaged in Clause 9.04, the only recourse available to the Petitioner is by way of filing the present petition.

12. In view of the above, the present petition is allowed and accordingly, Hon'ble Mr. Justice Brijesh Sethi (Retd.) former Judge of this Court [Contact No.: +91 9910384669] is appointed as the common Sole Arbitrator to adjudicate the disputes that are stated to have arisen between the parties under the aforementioned Work Orders .

13. The parties are directed to appear before the learned Sole Arbitrator as and when notified. This is subject to the Arbitrator making the necessary disclosure under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act.

14. The learned Arbitrator will be paid his fee in terms of the provisions of the Fourth Schedule appended to the Act.

15. It is clarified that the Arbitral Tribunal would consider the claims before it on merits, uninfluenced by any observations made by the Court.

SANJEEV NARULA, J

MARCH 15, 2021

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(corrected and released on 26th March, 2021)