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\$~2 to 4 of 2020 (20.08.2021)

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **ARB.P. 794/2020**
WADIA TECHNO-ENGINEERING SERVICES LIMITED
..... Petitioner
Through: Mr. Shambo Nandy, Advocate.

versus

**DIRECTOR GENERAL OF MARRIED ACCOMMODATION
PROJECT & ANR.** Respondents
Through: Mr. Vijay Joshi, Advocate.

+ **ARB.P. 795/2020**
WADIA TECHNO-ENGINEERING SERVICES LIMITED
..... Petitioner
Through: Mr. Shambo Nandy, Advocate.

versus

**DIRECTOR GENERAL OF MARRIED ACCOMMODATION
PROJECT & ANR.** Respondents
Through: Mr. Satya Ranjan Swain, Central
Government Senior Panel Counsel
with Mr. Kautilya Birat, Advocate for
R-1 & 2.

+ **ARB.P. 796/2020**
WADIA TECHNO-ENGINEERING SERVICES LIMITED
..... Petitioner
Through: Mr. Shambo Nandy, Advocate.

versus

DIRECTOR GENERAL OF MARRIED ACCOMMODATION

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been compared and the digital data is as per
the physical file and no page is missing.
ARB. P. 794-796/2020

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PROJECT & ANR.

..... Respondents

Through: Mr. Neeraj, Mr. Sajag Garg,
Mr. Vedansh Anand and Mr. Rudra
Paliwal, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

ORDER

23.08.2021

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[VIA VIDEO CONFERENCING]

1. The matters are taken up today, as 20th August, 2021 was declared to be a public holiday on account of 'Muharram'.
2. The replies filed by the Respondents are not on record, although rejoinder thereto is on the file. Counsel for the Respondents have emailed the copies of the replies to the Court Master, which are taken on record. Additionally, the counsels shall also remove objections of the Registry and have the replies placed on court file.
3. Petitioner was awarded work in relation to "Detailed Engineering and Project Management Consultancy Services for Married Accommodation Projects" (DEPMC) for construction of residential accommodation at Ahmednagar, Deolali, Nasik (AF), at various sites under separate letters, details whereof are as under:
 - (i) Letter of Acceptance No. 81932/MAP/PH-II/DEPMC/PKG-24/40/E-8 dated 22nd May, 2009 along with Contract Agreement of the same date [which is the subject matter of Arb. P. 794/2021];
 - (ii) Letter of Acceptance No. 81931/MAP/PH-II/DEPMC/PKG-23/60/E-8 dated 22nd May, 2009 along with Contract Agreement of the same

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- date [which is the subject matter of Arb. P. 795/2021]; and
- (iii) Letter of Acceptance No. 81944/MAP/PH-II/DEPMC/PKG-36/43/E-8 dated 22nd May, 2009 along with Contract Agreement of the same date [which is the subject matter of Arb. P. 796/2021].

4. Briefly stated, the case of the Petitioner is that, as per the identical Contract Agreements, the project completion date was of April 2012. Due to poor progress of work by the contractors, the project extended beyond the stipulated date. In fact, the project is still continuing, with no end in sight. Petitioner continuously rendered uninterrupted services beyond the contractual time schedule and incurred high cost due to idling of engineer-professionals deployed for the project. As a result of such time overrun, Petitioner suffered substantial losses and requested the Respondent for enhancement of contract price due to increase in project cost and additional fee for the extended period, taking into consideration the surge in remuneration package of all categories of professionals as well as rise in Consumer Price Index (CPI). Since the Respondents did not agree, Petitioner invoked Article 17 of the Contract Agreement which deals with settlement of disputes, and requested the Respondent to appoint an Arbitrator. This request was also not acceded to, constraining the Petitioner to approach this Court under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter the 'Act') by way of the instant petitions.

5. Respondents, in their reply, do not dispute the existence of the Contract Agreements. They however raise objections as to maintainability by arguing that the petitions are premature. Mr. Satya Ranjan Swain, Mr. Vijay Joshi

and Mr. Neeraj, counsels for the Respondents, rely upon Article 17 of the Agreement, which reads as under:

“Article 17 Settlement of Disputes

All disputes, between the parties to the contract (other than those for which the decision of the DGMAP or any other person is by the contract expressed to be final and binding) shall, after written notice by either party to the Contract to the other of item, be referred to the sole arbitration of serving officer having degree in Engineering or equivalent or having passed Final I Direct Final Examination of Sub Division II of Institution of Surveyors (India) recognized by the Govt of India to be appointed by the Engineer-in-Chief, E-in-C's Branch, Kashmir House, New Delhi-11 or Director General of Works if specifically delegated in writing by Engineer-in-Chief, Army Headquarters, New Delhi whose decision shall be final, conclusive and binding. The Arbitration shall be governed by Arbitration and Conciliation Act, 1996.

Unless both the parties agree in writing, such reference shall not take place until after the completion of the Works or termination or determination of the Contract under conditions of the contract.

Provided that in the event of abandonment of the works or cancellation of the Contract under conditions of this contract, such reference shall not take place until alternative arrangements have been finalized by the OWNER to get the works completed by or through any other consultant or consultants or Agency or agencies.

Provided always that commencement or continuance of any arbitration proceeding hereunder or otherwise shall not in any manner militate against the Owner's right of recovery from the consultant as provided in conditions of this contract.

If the arbitrator so appointed resigns his appointment or vacates his office or is unable or unwilling to act due to any reason whatsoever, the authority him may appoint a new Arbitrator to act in his place.

The Arbitrator may proceed with the arbitration, exparte, if either party, inspite of notice from the Arbitrator, fails to take part in the proceedings

The Arbitrator shall give his reasoned award in writing on all matters referred to him and shall indicate his findings, along with sums awarded, separately on each individual item of dispute.

The venue of arbitration shall be such place or places as may be fixed by the Arbitrator in his discretion.

The language of the arbitration proceedings and that of all documents any communications between the parties shall be "English".

The award of the Arbitrator shall be final and binding on both the parties to the contract.

Notwithstanding the fact that the stations of work are anywhere in India, only the courts at Delhi/New Delhi shall have the jurisdiction to adjudicate and settle any disputes between OWNER and the consultant. No other court outside Delhi/New Delhi shall have any jurisdiction on any matter requiring reference to Civil Court.” [emphasis supplied]

6. They submit that in terms of the underlined proviso, unless both the parties agree in writing, no reference to arbitration can be made until after the alleged completion of work, for determination of the contract under conditions of the contract. They urge that in view of the aforesaid provision, the Petitioner cannot request for Arbitration at this stage. Further, they also

argue that the Petitioner is supposed to render all assistance in arbitrable disputes between the Respondents and the contractor, and therefore, it would be inconceivable that there would be further parallel arbitration(s) between the parties.

7. Mr. Swain acknowledges that this Court has taken a view against the Respondents in other similar petitions, but points out that the said decisions have been assailed by the Respondents in Special Leave to Appeal before the Supreme Court. In the said challenge, leave has indeed been granted and the hearings have been deferred to await the outcome of the said appeals. He also submits that the view taken by this Court allowing the other petition is not correct. The observations made in the judgment regarding Article 17 being in conflict with Section 28 of the Indian Contract Act, 1872, is erroneous. He relies upon the the exception to Section 28 of the Indian Contract Act, 1872, to emphasize that the proviso to Article 17 of the Contract Agreement is valid and enforceable.

8. Mr. Shambo Nandy, counsel for the Petitioner, controverts the contentions of the Respondents and submits that the objections raised by the Respondents have already been rejected by this court. The proviso to Article 17 is visibly void in light of Section 28 of the Indian Contract Act, 1872. This view taken by this Court, has not been stayed or interfered with by the Supreme Court. Further, the exceptions to Section 28 do not validate the proviso to Article 17 either. These exceptions only allow the parties to enter into an Agreement to arbitrate, whereas the proviso to Article 17 puts a complete embargo upon the Petitioner to agitate its claims. He urges that the

Petitioner cannot be left high and dry. Even though the Petitioner is continuing to fulfil its obligation under the Agreement, it does preclude them from agitating its claims in accordance with the dispute resolution mechanism.

9. The counsels have been heard. The objections raised by the Respondents have already been considered and rejected by a coordinate bench of this Court. Six similar petitions have been allowed by this Court against the Respondents.¹ Challenge was laid by the Respondents before the Supreme Court in respect of all the petitions. Initially, stay was granted in respect of four orders, however subsequently, the said petitions were dismissed on the ground on non-prosecution. In respect of the two remaining petitions, there is no interim stay granted by the Supreme Court. As a result, the arbitration proceedings have advanced to the stage of rejoinder arguments by the Claimant.

10. The objection of the Respondents regarding the maintainability of the petitions on the ground of being premature is devoid of merit. Since disputes have arisen between the parties, the Petitioner cannot be deprived of the remedy for Arbitration in terms of Article 17 contained in the Contract. The court finds no reason to take a view different from one taken by the coordinate bench of this court. *Prima facie*, Court also finds that the restrain in the proviso to Article 17 would be in the teeth of Section 28 of the Indian Contract Act, 1872 as it curtails the right of the Petitioner to seek legal

¹ In Arb. P 616/2014, Arb. P 619/2014, Arb. P 615/2014, Arb. P 500/2014, Arb. P 618/2014 and Arb. P 617/2014.

redressal by having the disputes referred to arbitration. The exceptions to Section 28, on a *prima facie* view, have no application to the facts of the present case. Those exceptions protect the right of the parties to agree for arbitration. That however does not mean that the an agreement can restrain the invocation of arbitration, till such time the Contract is not terminated or is not completed, thereby curtailing the right of a party to legal redressal.

11. Further, it is also to be noted that the Arbitration Clause as worded is not enforceable to the extent that it contemplates reference of disputes to arbitration before a serving employee, to be unilaterally appointed by the Engineer-in-Chief of the Respondent. This clause is clearly in conflict with Section 12(5) of the Act. The only remedy now available for the parties is to approach the Court under Section 11 of the Act.

12. In view of the above, the Court sees no hesitation in allowing the present petitions.

13. Accordingly, Hon'ble Mr. Justice A. K. Pathak, (Retd.) former Judge of this Court [Contact No.: +91 9910384602] is appointed as a common Sole Arbitrator to adjudicate the disputes arising between the parties in respect of the following agreements, all dated 22nd May, 2009:

- (i) Letter of Acceptance No. 81932/MAP/PH-II/DEPMC/PKG-24/40/E-8 along with Contract Agreement,
- (ii) Letter of Acceptance No. 81931/MAP/PH-II/DEPMC/PKG-23/60/E-8 along with Contract Agreement, and
- (iii) Letter of Acceptance No. 81944/MAP/PH-II/DEPMC/PKG-36/43/E-8

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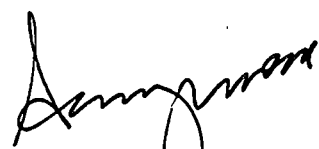
along with Contract Agreement.

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

15. The learned Arbitrator will be entitled to charge his fee in terms of the provisions of the Fourth Schedule appended to the Act.

16. It is clarified that the Court has not examined any of the claims of the parties and all rights and contentions on merits are left open. Both the parties shall be free to raise their claims/counter-claims before the learned Arbitrator in accordance with law.

17. The petitions are allowed in the above terms.



SANJEEV NARULA, J

AUGUST 23, 2021

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