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

+ **ARB.P. 180/2021**

N.N. BUILDCON PRIVATE LIMITED Petitioner

Through **Mr. Vineet Jhanji and Mr. Imran
Moulaey, Advocates**

versus

HSCC(INDIA) PRIVATE LIMITED & ANR. Respondents

Through **None.**

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

J U D G M E N T

% **11.11.2021**

1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 ("the 1996 Act"), seeking appointment of an Arbitrator to arbitrate on the disputes between the parties.

2. Notice was issued in this petition on 3rd February, 2021. Respondent 2 appeared on 4th May, 2021. Thereafter, there has been no appearance on behalf of Respondent 2. Respondent 1 has been served, by all modes including *dasti*. Respondent 1, however, did not appear before the Court on any of the dates of hearing.

3. No counter-affidavit has been filed, in response to the petition.

4. As such, I have heard Mr. Vineet Jhanji, learned Counsel for the petitioner, and proceeded to dispose of the petition.

5. The dispute arises out of an agreement dated 29th August, 2016, between the petitioner and Respondent 1. Respondent 1 executed the agreement on behalf Respondent 2, All India Institute of Medical Sciences (AIIMS). Mr. Jhanji has pointed out that, in the agreement, “Department” is defined as AIIMS, New Delhi/HSCC. As such, the petition has been filed arraigning HSCC as well as AIIMS as Respondents 1 and 2, respectively.

6. The petitioner was engaged by Respondent 1 for construction of a hostel in the premises of AIIMS, *vide* agreement dated 29th August, 2016. The plaintiff alleges that there had been defaults in payment, by the respondents, of the final bill raised by the plaintiff.

7. The agreement between the petitioner and the respondents provided, in Clause 25, thus :-

**“CLAUSE 25
SETTLEMENT OF DISPUTES & ARBITRATION**

Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, design, drawings and instructions here-in before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or

abandonment thereof shall be dealt with as mentioned hereinafter:

(i) If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the Engineer-in-Charge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the authority as indicated in Schedule 'F' (Reviewing Authority) in writing for written instruction or decision. Thereupon, the Reviewing Authority shall give his written instructions or decision within a period of one month from the receipt of the contractor's letter.

If the Reviewing Authority fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Reviewing Authority, the contractor may, within 15 days of the receipt of Reviewing Authorities' decision, appeal to the authority as indicated in Schedule 'F' (Appealing Authority) who shall afford an opportunity to the contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Appealing Authority shall give his decision within 30 days of receipt of contractor's appeal.

If the contractor is dissatisfied with the decision of the Appealing Authority, the contractor may within 30 days from the receipt of the Appealing Authority's decision, appeal before the Dispute Redressal Committee (DRC) along with a list of disputes with amounts claimed in respect of each such dispute and giving reference to the rejection of his disputes by the Appealing Authority. The Dispute Redressal Committee (DRC) shall give his decision within a period of 90 days from the receipt of Contractor's appeal. The constitution of Dispute Redressal Committee (DRC) shall be as indicated in Schedule 'F'.

If the Dispute Redressal Committee (DRC) fails to give his decision within the aforesaid period or any party is

dissatisfied with the decision of the 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.

(ii) Except where the decision has become final, binding and conclusive in terms of Sub Para (i) above, disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Client. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever, another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Appealing Authority of the appeal.

It is also a term of this contract that no person, other than a person appointed by the Client, as aforesaid, should act as arbitrator and if for any reason that is not possible, the matter shall not' be referred to arbitration at all.

It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the Department/Client/Government shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs. 1,00,000/-, the arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the arbitrator, these shall be paid equally by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost & f. the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid."

8. In accordance with the protocol prescribed in Clause 25 of the agreement, the petitioner first wrote, on 6th December, 2019, to the Executive Director and Chief General Manager of HSCC, seeking disbursal of its outstanding claims. Thereafter, on 10th January, 2020, the petitioner

wrote to the Director (Engineering) and the Chief General Manager of HSCC, for written instructions/decisions of the reviewing authority, in terms of Clause 25 of the agreement. An appeal was preferred, to the Appellate authority on 24th February, 2020.

9. No response was received by the petitioner, to any of these communications.

10. In the circumstances, and further in accordance with Clause 25, the petitioner requested the respondent to constitute a Disputes Redressal Committee (DRC) to examine the petitioner's claim. A further communication dated 8th May, 2020 was also addressed by the petitioner to the Director, AIIMS, drawing his attention to the pendency of the petitioner's claims.

11. These communications, too, elicited no response.

12. In these circumstances, on 10th June, 2020, a notice, invoking the arbitral process, was issued by the petitioner to the respondent. The petitioner received a reply, from AIIMS, on 16th June, 2020, informing the petitioner that AIIMS had approved the constitution of a three-member DRC. The petitioner, *vide* letter dated 19th June, 2020 requested for the contact details of the members of the DRC. Despite not receiving any response to this request either, on 30th June, 2020, the claim of the petitioner was submitted to the DRC.

13. The DRC, it is alleged, failed to take any decision on the petitioner's claims within the prescribed period of 90 days, as mentioned in Clause 25 of the contract.

14. In these circumstances, the petitioner addressed a fresh notice, invoking the arbitration in terms of the Clause 25 of the contract through its letter dated 3rd October, 2020. It was also correctly pointed out by the petitioner in the said letter, that, though Clause 25 empowered AIIMS to appoint the Arbitrator, in the event of failure of the pre-arbitral dispute resolution process, the said clause was not legally enforceable, in view of Section 12(5) of the 1996 Act, read with the judgments of the Supreme Court in *Bharat Broadband Network Ltd. v. United Telecoms Ltd.*¹, *Perkins Eastman Architects DPCC v. HSCC (India) Ltd.*², *TRF Limited v. Energo Engg. Projects Limited*³ and *Haryana Space Application Centre v. Pan India Consultants Pvt Ltd.*⁴

15. No response having been received to the said communication either, the petitioner has moved this Court.

16. As no response has been filed by either of the respondents, these assertions stand admitted by non-traverse.

17. Before this Court, too, the respondents have been unresponsive. There has been a sporadic appearance on behalf of Respondent 2; however, the

¹ (2019) 5 SCC 755

² 2019 SCC OnLine SC 1517

³ (2017) 8 SCC 377

⁴ (2021) 3 SCC 103.

said respondent also remained absent after 4th May, 2021.

18. The recitals in the plaint clearly make out the existence of a dispute, arbitrable in accordance with the arbitration clause in the contract between the parties.

19. In the circumstances, I deem it appropriate to refer this matter to the Delhi International Arbitration Centre (DIAC) to appoint a suitable arbitrator to arbitrate on the dispute, especially as Mr. Jhanji submits that the disputes are technical in nature and that it would, therefore, be more appropriate that the arbitrator be a person with the requisite technical knowledge. It shall be open to the petitioner to make this request before the DIAC so that DIAC could appoint a suitable arbitrator.

20. The arbitration would take place under the *aegis* of the DIAC and would abide by its rules and regulations. The Arbitrator would be entitled to fees as per the schedule of fees fixed by the DIAC.

21. With the aforesaid directions, this petition stands disposed of.

C.HARI SHANKAR, J

NOVEMBER 11, 2021

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