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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
Date of decision: 19th March, 2021
+ **W.P.(C) 3597/2021 & CM APPLs.10938-39/2021**

JAGDISH CHAND GUPTA Petitioner
Through: Mr. Anish Chawla, Advocate.
(M:9953541910)
versus

NHPC LTD & ANR. Respondents
Through: Mr. Piyush Sharma, Advocate for R-
1. (M:9810613750)

CORAM:
JUSTICE PRATHIBA M. SINGH
Prathiba M. Singh, J. (ORAL)

1. The present petition has been filed by the Petitioner challenging the impugned letter dated 24th June 2019, issued by Respondent No. 1- NHPC Ltd. (*hereinafter* “NHPC”), directing the appointment of Shri. H.L. Bajaj as the Adjudicator in respect of claims raised by NHPC for a sum of Rs.4.55 crores *qua* the Reconstruction of the permanent bridge over the River Jhelum at Bandi, Jammu and Kashmir.
2. The case of the Petitioner is that the appointed Adjudicator had earlier rejected the claim for compensation of the NHPC, and a second round of adjudication by the same Adjudicator is not permissible, under the terms of the contract entered into on 6th February 2006.
3. Mr. Anish Chawla, Id. counsel for the Petitioner submits that the Adjudicator is charging a huge fee and the Petitioner is being saddled with the expenses of the same. In terms of the contract, he submits that the Adjudicator ought to have decided the issue within 28 days, as provided in Clause 56.1.2 of the General Conditions of Contract, which he has failed to

do and hence he became *functus officio*.

4. On the other hand, Mr. Sharma, Id. counsel for Respondent No.1, has challenged the territorial jurisdiction of this court on the ground that the entire project was to be executed in Srinagar, Jammu & Kashmir, and even the venue of the arbitration is Srinagar, Jammu & Kashmir. Accordingly, he submits that this Court ought not to entertain the present writ petition.

5. The Court has perused the contract, especially clause 56 of the contract, which lays down the complete mechanism for settlement of disputes, including for the appointment of Adjudicator, and thereafter for arbitration proceedings.

6. This court is of the view that as a proper mechanism of settlement of disputes is provided as per scheme of the contract, the exercise of jurisdiction of this Court, under Article 227 of the Constitution of India is not appropriate.

7. If the Petitioner is aggrieved by any decision/action taken by the Adjudicator, or with the appointment of the Adjudicator, a challenge to the same ought to be raised before the appropriate forum as per the contractual scheme, if the Petitioner deems it appropriate. If the Adjudicator has given an order, which is liable to be challenged, the Petitioner would have to resort to settlement/adjudication of disputes as per the procedure prescribed under clause 56 of the contract, and cannot invoke the jurisdiction of this Court, under Art. 227 of the Constitution of India, unless there is a case of perversity that is made out. The said clause reads:

“CLAUSE-56: SETTLEMENT OF DISPUTES:

56. 1 Adjudicator

56.1.1 If any dispute of any kind whatsoever shall arise between the Corporation and the Contractor in connection with or arising out of the Contract, including without prejudice to the generality of the foregoing any question regarding its existence, validity or termination, or the execution of the Facilities - whether during the progress of the facilities or after their completion and whether before or after the termination abandonment or breach of the Contract - the parties shall seek to resolve any such dispute of difference by mutual consultation. If the parties fail to resolve such a dispute or difference by mutual consultation. If the parties fail to resolve such a dispute or difference by mutual consultation then the dispute shall be referred writing by either party to the Adjudicator, with a copy to the other party.

56.1.2. The Adjudicator shall give its decision in writing to both parties within twenty-eight days of a dispute being referred to it. If the Adjudicator has done so and no notice of intention to commence arbitration has been given by either the Corporation or the contractor within fifty six (56) days of such reference, the decision shall become final and binding upon the Corporation and the Contractor. Any decision, which has become final and binding, shall be implemented by the parties forthwith.

56.1.3 The Adjudicator shall be paid a daily fee for the hearings at the rate decided and agreed

upon between the parties and the Adjudicator plus reasonable expenditures incurred in the execution of its duties as Adjudicator, and these costs shall be divided equally between the Corporation and the Contractor.

56.1.4. Should the Adjudicator resign or die or should the Corporation and the Contractor agree that the Adjudicator is not fulfilling its functions in accordance with the provisions of the Contract, a new Adjudicator shall be jointly appointed by the Corporation and the Contractor. Failing agreement between the two within twenty eight (28) days, the new adjudicator shall be appointed at the request of either party by the Appointing Authority. (The Institution of Engineers India shall be the Appointing Authority). –

56.2 Arbitration:

56.2.1 If either the Corporation or the Contractor is dissatisfied with the Adjudicator's decision or if the Adjudicator fails to give a decision within twenty eight days of a dispute being referred to it, then either the Corporation or the Contractor may, within fifty six days of such reference give notice to the other party, with a copy for information to the Adjudicator of its intention to commence arbitration as hereinafter provide as to the matter in dispute and no arbitration in respect of this matter may be commenced unless such notice is given.

56.2.2 Any dispute, in respect of which a notice of intention to commence arbitration has been

given in accordance with GCC sub-clause 56.2.1, shall be finally settled by arbitration. Arbitration may be commenced prior to or after completion of the Facilities.

56.2.3 Any dispute submitted by a party to arbitration shall be heard by an arbitration panel composed of three arbitrators in accordance with the provisions set forth below.

56.2.4 The Corporation and the Contractor shall each appoint one arbitrator, and these two arbitrators shall jointly appoint a third arbitrator, who shall chair the arbitration panel. If the two arbitrators do not succeed in appointing a third arbitrator within twenty eight (28) days after the latter of the two arbitrators has been appointed the third arbitrator shall, at the request of either party, be appointed by the Appointing authority. (The Institution of Engineers India shall be the Appointing Authority).

56.2.5 If one party fails to appoint its arbitrator within forty two (42) days after the other party has named its arbitrator, the party, which has named an arbitrator, may request the Appointing Authority to appoint the second arbitrator.

56.2.6 If for any reason an arbitrator is unable to perform its function, the mandate of the Arbitration shall terminate in accordance with provisions of applicable laws as mentioned in GCC, clause 55, a substitute shall be appointed in the same manner as the original arbitrator.

56.2.7 Arbitration proceedings shall be conducted as laid down below:

- *The dispute when referred to arbitration shall be resolved under the provisions of Indian Arbitration and Conciliation Act 1996.*
- *The venue of arbitration proceedings shall be Srinagar, India*
- *The language shall be English.*
- *The court of jurisdiction shall be the District Court of Baramulla/High Court of Jammu & Kashmir, Srinagar/Jammu.*

56.2.8 The decision of a majority of the arbitrators (or of the third arbitrator chairing the arbitration if there is no such majority) shall be final and binding and shall be enforceable in any court of competent jurisdiction as decree of the court. The parties thereby waive any objections to or claims of immunity from such enforcement.

56.2.9 The arbitrator(s) shall given reasoned award.

56.2.10 Notwithstanding any reference to the Adjudicator or Arbitrator herein.

(a) the parties shall continue to perform their respective obligations under the Contract unless they otherwise agree.

(b) The Corporation shall pay the Contractor any moneys due to the Contractor.

Note: In case of contract with another Public Sector Undertaking/Govt. Department, the above said clause 56.2 shall stand deleted and the

following Arbitration clause shall apply:-

“56.2.1 Except as otherwise provided, in clause 53 herein before, all questions, disputes or differences in respect of which the decision has not been final and conclusive, arising between the contractor and the corporation, in relation to or in connection with the contract shall be referred to arbitration in the manner provided as under:

In the event of any dispute or difference relating to the interpretation and application of the provisions of the contracts, such dispute or difference shall be referred by either party to the Arbitration of one of the Arbitrators in the Department of Public Enterprises to be nominated by the Secretary to the Government of India in charge of the Bureau of Public Enterprises. The Arbitration and Conciliation Act 1996 shall not be applicable to the arbitration under this clause. The award of the Arbitrator shall be binding upon the parties to the dispute, provided, however, any party aggrieved by such award may make a further reference for setting aside or revision of the award to the Law Secretary, Department of Legal Affairs, Ministry of Law and Justice, Government of India. Upon such reference the dispute shall be decided by the Law Secretary or the Special Secretary/Additional Secretary when so authorized by the Law Secretary whose decision shall bind the parties finally and conclusively. The parties to the dispute will share equally the cost of arbitration as intimated by the Arbitrator.

56.2.2 A notice in writing of the existence of question, dispute or difference in relation to, or in connection with the contract shall be served by either party within 90 (Ninety) days of the first occurrence of any event upon which the said question, dispute or difference is based, failing which all rights and claims of the parties under this contract in relation to or in connection with such question, dispute or difference shall be deemed to have been waived off and thus, forfeited and absolutely barred. The decision of the Engineer-in-charge with regard to the first occurrence of such event for the purpose of reckoning the said period of limitation shall be final and binding.

56.2.3 The arbitrator shall make a speaking award.

56.2.4 The work under this contract shall continue during Arbitration proceedings and payments due from or payment by the corporation shall be withheld on account of such proceedings except to the extent which may be in dispute”

8. From the above clause it is clear that there are various levels of dispute resolution which are contemplated:

Level 1: Resolution of disputes by mutual consultation.

Level 2: Reference by either party to the Adjudicator who would decide the issue within 28 days. Once the adjudicator decides the issue and there is no reference to arbitration by either party within 56 days, the decision of the Adjudicator would be final and binding on the parties who would be bound to implement the same. The fee of the

Adjudicator is to be divided equally between the parties.

Level 3: If there is failure of the Adjudicator in acting within 28 days, either party may approach the Institution of Engineers, which would be the Appointing Authority.

Level 4: Upon being dissatisfied by the Adjudicator's decision, either party may give notice to the other party, with a copy to the Adjudicator, of its intention to invoke arbitration. The Arbitration would be by a panel of three arbitrators appointed as per clauses 56.2.4, 56.2.5, 56.2.6. The seat and venue of arbitration is Srinagar, J&K, India and the Courts in J&K were agreed to be the courts of jurisdiction.

Level 5: Independent of Level 1, Level 2 and Level 3, if there is any dispute as to the interpretation and applications of the contract, either party can refer the same to arbitration by one Arbitrator to be nominated by the Secretary, Govt. of India in charge of the Bureau of Public Enterprises. In respect of this arbitration, the Arbitration & Conciliation Act, 1996 would not apply. The award would be binding on parties.

Level 6: If either party is aggrieved by a 'Level 5' arbitral award, the dispute is to be decided by the Law Secretary, GOI or a Special Secretary authorised by the Law Secretary. Moreover, as per the jurisdiction clause, the seat and venue of proceedings of arbitration would be Srinagar, J&K.

A perusal of the above shows that the mechanism specified in the contract is detailed and quite exhaustive. The Petitioner has various options to exercise if it is either aggrieved by the appointment of the Adjudicator, name of the Adjudicator or if it wishes to challenge any other aspect of the said

appointment.

9. Insofar as the prayer of Id. counsel for the Petitioner that a new Adjudicator ought to be appointed, as he was already appointed earlier and had taken a decision in the matter, the Petitioner may approach the NHPC with a representation which shall be considered by the NHPC in accordance with law, within a period of two weeks. If the representation is decided against the Petitioner or if the Petitioner is aggrieved in any manner thereafter, the remedies of the Petitioner are left open.

10. In view of the above, and keeping in mind the stipulations in clause 56 of the contract, the present petition is held to be not maintainable and is dismissed. Needless to add that this Court has not examined the merits of the allegations.

11. The petition and all pending applications are disposed of in the above terms

**PRATHIBA M. SINGH
JUDGE**

MARCH 19, 2021/dk/Ak