

\$~2 (Original Side)

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

+ ARB.P. 543/2021, I.A. 6866/2021

H S OBEROI BUILDTECH PVT. LTD Petitioner

Through: Mr. Ashok Chhabra, Advocate
with Mr. Pawan Kumar Mittal,
Advocate.

versus

MAHAMAYA INFRASTRUCTURE PVT. LTD... Respondent

Through: Mr. Adab Singh Kapoor and
Mr. Sameer Choudhary,
Advocates.

CORAM:

HON'BLE MR. JUSTICE C .HARI SHANKAR

ORDER (ORAL)

%

13.09.2021

(Video-Conferencing)

1. This is a petition under Section 11 of the Arbitration and Conciliation Act, 1996 (“the 1996 Act”) for reference of the disputes between the parties to arbitration.

2. The only objection, raised by Mr. Kapoor, learned Counsel for the respondent, is tethered on Clause 52.2.2 of the General and Special Conditions of Contract (“GSCC”, in short). Clauses 52.2.1 and 52.2.2 of the GSCC may, for this purpose, be reproduced thus;

“52.2 Arbitration

52.2.1 Any dispute arising out of a Notified Claim of the

ARB.P. 543/2021

Page 1 of 4

Contractor include[sic] in the Final Bill of the Contractor in accordance with the provisions of Clause 52.1.2 hereof, and any dispute arising out of any Claim(s) of the Owner against the Contractor shall be referred to the arbitration of a Sole Arbitrator selected in accordance with the provisions of Clause 52.2.2 hereof. It is specifically agreed that the Owner may prefer its Claim(s) against the Contractor as counter-claim(s) if a Notified Claim of the Contractor has been referred to arbitration. The Contractor shall not, however, be entitled to raise as a set-off defense or counter-claim any claim which is not a Notified Claim included in the Contractor's Final Bill in accordance with the provisions of Clause 52.1.1 hereof.

52.2.2 The Sole Arbitrator referred to in Clause 52.2.1 hereof shall be selected by the Contractor out of a panel of 3 (three) persons nominated by the Owner for the purpose of such selection, and should the Contractor fail to select an arbitrator within 30 (thirty) days of the panel of names of such nominees being furnished by the Owner for the purpose, the Sole Arbitrator shall be selected by the Owner out of the said panel.”

Admittedly, there was a default, on the part of the petitioner, in selecting a contractor out of the panel of three persons nominated by the respondent. This would bring into operation the second part of Clause 52.2.2 which envisages selection of the arbitrator by the Owner. This part of the Clause is, however, inoperable in view of the law laid down by the Supreme Court in *Bharat Broadband Network Ltd. vs. United Telecoms Ltd*¹ and *Perkins Eastman Architects DPC & Anr. vs. HSCC (India) Limited*² as well as of this Court in *Proddatur Cable TV Digi Services vs. SITI Cable Network Limited*³

¹ (2019) 5 SCC 755

² (2020) 20 SCC 760

³ (2020) 267 DLT 51

3. Mr. Kapoor's submission is that, though he has no objection to an arbitrator being appointed by this Court, in view of the default on the part of the petitioner in selecting an arbitrator out of the panel of three arbitrators provided by the respondent, compliance with the protocol contemplated by Clause 52.2.2 would require this court to appoint an Arbitrator from the said panel.

4. The submission is merely required to be stated to be rejected. The power of this Court to appoint an arbitrator, under Section 11(6), cannot be hedged in by any panel of arbitrators suggested by one party or the other. Once Section 11(6) of the Arbitration Act applies, it is for the Court to appoint an Arbitrator, as per its best judgment. There is no question of requiring this Court to appoint the Arbitrator out of the panel of arbitrators suggested by the respondent.

5. The opening part of Clause 52.2.2 applies only to provide a choice of arbitrators to the petitioner. It does not provide a choice of arbitrators to the Court. Once the petitioner has not chosen an arbitrator out of the said panel, and the second part of Clause 52.2.2 cannot be worked on account of the law laid down in the aforesaid decisions, this Court has to appoint the arbitrator independently of Clause 52.2.2.

6. The submission of Mr. Kapoor, learned Counsel, that the Court should appoint arbitrator out of the panel of arbitrators suggested by the respondent is, therefore, unequivocally rejected.

7. No other objection to the reference of the dispute to arbitration having been advanced by Mr. Kapoor, this Court appoints Mr. Gautam Narayan, Advocate (Cell No.: 9811411735 & E-mail ID: g.narayanoffice@gmail.com), as the sole arbitrator to arbitrate on the aforesaid disputes between the parties

8. The learned Arbitrator would be entitled to charge fees in accordance with the Fourth Schedule to the 1996 Act or as otherwise agreed in consultation with the parties. The learned Arbitrator is also requested to furnish the requisite disclosure under Section 12(2) of the 1996 Act within a week of entering on reference.

9. This petition stands allowed in the aforesaid terms with no order as to costs.

C. HARI SHANKAR, J

SEPTEMBER 13, 2021

hd