

\$~2

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

% ***Date of decision: 06.10.2021***

+ **ARB.P. 787/2021**

MONTECARLO LIMITED Petitioner

Through **Mr. Pratyush Prasanna, Adv.**

versus

REGAL EMPORIA INFRATECH PVT LTD Respondent

Through **Mr. Alok K. Aggarwal,
Ms. Anushruti and Mr. Raj Duggal,
Advs.**

**CORAM:
HON'BLE MR. JUSTICE SURESH KUMAR KAIT**

J U D G M E N T (oral)

1. Petitioner- M/s Montecarlo Limited has preferred the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking appointment of Arbitrator to adjudicate the dispute with respondent.

2. According to petitioner, respondent- Regal Emporia Infratech Pvt Ltd, registered under the Companies Act, 1956, had invited tender for erection, construction, execution and completion of works relating to Civil & Structural including but not limited to other services related to civil and structure works from start to completion for a mix use project known as "Regal Emporia" situated at Plot No. C-02, Sector-4, Greater Noida, Gautam

Budh Nagar and petitioner, having substantial experience in the civil work and construction activities, approached respondent and showed interest in various services to the respondent for the said project. Respondent vide Letter of Intent dated 11.03.2015 awarded the said work to petitioner and so, the parties entered into an agreement dated 07.04.2015. The execution of work commenced on 10.04.2015, which was to be completed on 10.04.2018.

3. According to petitioner, it suffered various losses due to the lapses on the part of respondent like delay in handing over of the drawings, delay in receipt of free issue of materials, delay in payments etc. and also due to situation beyond the control of the petitioner like Covid pandemic. Therefore, vide e-mail dated 04.06.2020, petitioner sent an email to the respondent seeking extension for completion of project which was granted and the date of completion was extended to 05.04.2021. The petitioner vide its letter dated 18.03.2021 claims to have submitted interim claim of Rs.41,03,45,815.15/- to respondent due to prolongation of project upto 01.03.2021. Since respondent failed to reply to the aforesaid letter dated 18.03.2021 and make payment of interim claim, petitioner issued a notice of dispute dated 30.03.2021 regarding the underutilized claim amounting to Rs.41,03,45,815.15/- for a period of July 2016 till March 2021.

4. It is further averred in the petition that several joint discussions between representative of both the sides to amicably resolve the disputes took place like on 09.10.2020 and 28.01.2021, however, parties could not resolve it. Therefore, in accordance with General Conditions of the Contract as well as Clause- 21 of the Contract Agreement, petitioner vide Notice dated 30.03.2021 referred the dispute to Managing Director of the respondent. Once again vide letter dated 03.04.2021, petitioner sought extension of time for completion of the project till 03.08.2021 citing reasons for Force Majeure, however, respondent vide its letter dated 05.04.2021 refused to grant any further extension and also referred to Clause 20 (b) and 20 (c) of the Contract Agreement, which provides for termination of Contract Agreement by giving 30 days' time in writing. Thereafter, petitioner vide letter dated 13.04.2021 requested respondent to clear all dues and reimburse the claims.

5. Petitioner further claims to have sent letter dated 26.06.2021 informing respondent of commencement of arbitration and proposed name of a former Judge of Supreme Court of India as sole Arbitrator and sought respondent's consent. In reply to the aforesaid, vide letter dated 01.07.2021 respondent declined to the proposed name of Arbitrator by the petitioner and

further, vide letter dated 28.07.2021 issued a letter to the petitioner informing that it is under the process of selecting an Arbitrator.

6. The stand of petitioner is that since respondent is an interested party, against which petitioner has raised claims, therefore, respondent has no right to propose or appoint the Arbitrator. In support of aforesaid averment, reliance is placed upon decision in ***Perkins Eastman Architects DPC v. HSCC (India) Ltd.*** 2019 SCC Online SC 1517. Next, since respondent has not yet proposed/nominated any name of Arbitrator pursuant to Clause -21 of the Contract Agreement, therefore, the present petition deserves to be allowed.

7. At the hearing, learned counsel appearing on behalf of respondent disputed the claims raised by the petitioner, however, very fairly conceded that the disputes *inter se* parties can be resolved through arbitration and prayed this Court that this Court may appoint sole Arbitrator.

8. This Court has heard the submissions advanced by both the sides.

9. Upon hearing, this Court finds that counsel representing both the sides have not disputed existence of Contract Agreement dated 07.04.2015 and also that there are disputes *inter se* parties, which could not since be resolved through conciliation, therefore, are required to be resolved through

arbitration. Reliance placed by petitioner's counsel upon Hon'ble Supreme Court's decision in *Perkins Eastman (Supra)* to submit that respondent has vested rights and so, be not permitted to appoint its Arbitrator, does not appeal to this Court, as in the said decision it has been categorically stated that "*in cases where one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator.*" Therefore, though it does not meet the contention so raised above by petitioner's counsel but is very well placed upon in the present case. The afore-noted dictum of Hon'ble Supreme Court in *Perkins Eastman (Supra)*, has been followed by Coordinate Benches of this Court in *Proddatur Cable Tv Digi Services Vs. Siti Cable Network Limited 2020 SCC OnLine Del 350* and *VSK Technologies Private Limited and Others Vs. Delhi Jal Board 2021 SCC OnLine Del 3525* and also in various decisions passed by this Court in unequivocal terms. Thus, concurring with the decision in *Perkins Eastman (Supra)*, the present petition is allowed.

10. Accordingly, **Mr. Justice (retd.) A. Ramalingeswara Rao (Mobile: 8330969969 & 9391002170)** is appointed sole Arbitrator to adjudicate the

disputes between the parties.

11. The fees of the learned Arbitrator shall be according to Fourth Schedule of the Arbitration and Conciliation Act, 1996.

12. The learned Arbitrator shall ensure compliance of Section 12 of Arbitration and Conciliation Act, 1996 before commencing the arbitration.

13. The present petition is accordingly disposed of.

14. A copy of this order be sent to the learned Arbitrator for information.

OCTOBER 6, 2021

rk/r

(SURESH KUMAR KAIT)
JUDGE

