

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

% **Reserved on: 05.10.2021**

Pronounced on: 28.10.2021

+ **ARB.P. 813/2021**

**BCC DEVELOPERS AND PROMOTERS PVT.
LTD.**

..... Petitioner

Through: Mr. Rahul Malhotra, Advocate

Versus

DELHI METRO RAIL CORPORATION LTD Respondent

Through: Mr. Arjun Natarajan & Mr. Sasank
Iyer, Advocates

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

JUDGMENT

1. Petitioner- M/s BCC Developers & Promoters Pvt. Ltd., a company registered under the provisions of Companies Act, 1956, has preferred the present petition under the provisions of Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking appointment of sole Arbitrator to adjudicate the dispute against respondent- M/s Delhi Metro Rail Corporation Limited, a joint venture of Government of India and Government of NCT of Delhi.

2. According to petitioner, Clause- 17 of the General Conditions of

Contract (GCC) forming Agreement dated 23.05.2014 comprises the arbitration agreement between the parties, under which disputes with regard to “construction of EWS quarters for relocation of project affected persons at Trilokpuri in connection with H. Nizammudin – Gokulpuri corridor of line-7 of Delhi MRTS Project of Phase-III” can be resolved.

3. Petitioner claims to have participated in tender invited by the respondent for the afore-noted project, which was accepted by the respondent vide its Letter of Acceptance No. DMRC/20/III-132/2013 dated 27.03.2014, which was further accepted by the petitioner vide its letter of intent dated 28.03.2014. Thereafter, petitioner and respondent entered into and executed the Agreement dated 23.05.2014, according to which time for completion of the project was stipulated 12 months, having commenced on 31.12.2014. Meaning thereby, the work was to be completed by 31.12.2015, however, according to petitioner, due to defaults on the part of respondent like delay in making payments and in provision of drawings etc., petitioner could not complete the work within the stipulated time and it got delayed by 52 months and the works could be finally completed on 21.04.2020.

4. Petitioner has averred that it had sent various letters to respondent

regarding intimation of work progress as well as clearance of pending bills, but respondent delayed the payments. Therefore, invoking Clause- 17 of GCC, petitioner issued a 'notice of dispute' vide letter dated 31.05.2021, enclosing detailed statement of claim detailing the disputes and issues pending between the parties in terms of Clause 17.4 of GCC. In response thereto, respondent issued a letter dated 02.06.2021 stating that in terms of Clauses- 17.4 read with Clause 17.5 of the GCC, petitioner had to raise disputes within 28 days of issuance of Performance Certificate dated 21.04.2020 and thereby, rendered the "notice of dispute" contractually invalid. The aforesaid communication of respondent dated 02.06.2021 was refuted by petitioner vide its letter dated 21.06.2021.

5. During the course of hearing, learned counsel for the petitioner claimed that in view of failure to initiate conciliation proceedings in terms of Clause- 17.5 of GCC by the respondent, petitioner invoked arbitration, as contained in Clause-17.6 read with Clause-17.9 of GCC and also since respondent's power to provide the panel of Arbitrators under Clause-17.9 stands disqualified under the provisions of amended Section 12 of Arbitration and Conciliation Act, 1996, the present petition has been filed seeking appointment of sole Arbitrator. Learned counsel further submitted

that respondent's letter dated 20.07.2021 providing a panel of five Arbitrators and calling upon petitioner to nominate its Arbitrator out of the said panel, is bad in law.

6. Lastly, it was submitted on behalf of petitioner that the disputes *inter se* parties have to be adjudicated strictly in terms of arbitration Agreement between the parties and petitioner is entitled to recover a sum of Rs. 17,62,50,063/- plus GST along with interest from respondent and thus, the present petition be allowed.

7. On the contrary, learned counsel appearing on behalf of respondent - M/s Delhi Metro Rail Corporation Limited has strongly opposed the claims raised by the petitioner. However, neither existence of Contract Agreement dated 23.05.2014 is disputed nor that in case of any disputes between the parties, the same shall be adjudicated in terms of Clause-17 of GCC. Learned counsel for respondent fairly conceded that in terms of Clause-17.9, disputes or differences, whatsoever arising between the parties, out of touching or relating to construction/manufacture, measuring operation or effect of the Contract or the breach thereof, shall be referred to arbitration. However, emphasized that in terms of sub-clause (a) to (c) of the aforesaid Clause-17.9, three Arbitrators are

required to be appointed out of a panel of five proposed/ nominated Arbitrators by the respondent. In support of his submissions, learned counsel placed reliance upon the decisions of Hon'ble Supreme Court in ***Central Organization for Railway Electrification Vs. M/S ECI-SPIC-SMO-MCML (JV) A Joint Venture Company*** 2019 SCC Online SC 1635; ***Special Leave to Appeal (C) No(s). 12670/2020 Union of India Vs. M/S Tania Constructions Limited.***

8. Learned counsel for respondent also placed reliance upon decisions of different Coordinate Benches of this Court dated 13.08.2021 in ARB.P. 762/2020, titled as ***URC Constructions(P) Ltd Vs. Delhi Metro Rail Corporation***; dated 23.03.2021, in O.M.P. (T) (COMM.) 32/2021, titled as ***Minesh Chopra Vs. Delhi Metro Rail Corporation***; dated 04.12.2020 in O.M.P. (T) (COMM.) 71/2020, titled as ***M/s IWORLD Business Solutions Private Limited Vs. Delhi Metro Rail Corporation Ltd.*** and dated 07.04.2021 in O.M.P. (T) (COMM.) 30/2021, titled as ***Iworld Business Solutions Private Ltd. Vs. M/S Delhi Metro Rail Corporation Limited.***

9. The rival contentions urged by both the sides were heard at length and the material placed on record as well decisions relied upon, have been

Carefully perused by this Court.

10. Pertinently, for a claim of 176.2 million approximately, the petitioner sent a “Notice of Dispute dated 31.05.2021” to respondent, which was objected to by respondent vide its letter dated 02.06.2021 stating that the “notice of dispute” could be raised only within 28 days of issuance of “Completion Certificate dated 21.04.2020” and was thus, not maintainable. Thereafter, vide letter dated 21.06.2021 petitioner informed the respondent that in terms of clause 17.4, within 60 days of issuance of notice of dispute, respondent was under the obligation to initiate conciliation proceedings, however, since the aforesaid notice of dispute has been rejected by the respondent, therefore, Clause-17.5 wherein it has been stipulated that if the conciliation is not initiated to resolve the disputes, then under Clause 17.6 arbitration proceedings can be instituted under the provisions of Arbitration and Conciliation Act, 1996, shall come into force. Further, petitioner also contended that panel of Arbitrators of the DMRC in terms of Clause-17.9 stand disqualified in view of Section 12 of the Act.

11. It is not disputed by counsel representing both the sides that the disputes *inter se* parties have to be resolved through arbitration in terms

of Clause-17. The ground for dispute is whether in view of afore-noted Clause -17 this petition seeking appointment of sole Arbitrator has to be allowed or that of respondent's plea seeking appointment of three arbitrators?

12. Pertinently, Clause- 17 of the General Conditions of Contract (GCC) forming Agreement dated 23.05.2014 comprises of the arbitration agreement, which reads as under: -

“17. CLAIMS, DISPUTES, CONCILIATION AND ARBITRATION

XXXX
XXXX

Arbitration

17.9 If the efforts to resolve all or any of the disputes through conciliation fails, then such disputes or differences, whatsoever arising between the parties, arising out of touching or relating to construction/manufacture, measuring operation or effect of the Contract or the breach thereof shall be referred to Arbitration in accordance with the following provisions:

- (a) Matters to be arbitrated upon shall be referred to a sole Arbitrator if the total value of the claim is upto Rs. 5 million and to a panel of three Arbitrators if total value of claims is more than Rs.5 million. The Employer shall provide a panel of three arbitrators which may also include DMRC officers for the claims upto Rs.5 million and **a panel of five Arbitrators which may also include DMRC officers for claims of more than Rs.5 million.** The Contractor shall have to*

choose the sole Arbitrator from the panel of three and/or one Arbitrator from the panel of five in case three Arbitrators are to be appointed. The Employer shall also choose one Arbitrator from this panel of five and the two so chosen will choose the third arbitrator from the panel only. The Arbitrator(s) shall be appointed within a period of 30 days from the date of receipt of written notice/ demand of appointment of Arbitrator from either party. Neither party shall be limited in the proceedings before such arbitration(s) to the evidence or arguments put before the Engineer for the purpose of obtaining his decision. No decision given by the Engineer in accordance with the foregoing provisions shall disqualify him from being called as a witness and giving evidence before the arbitrator(s) on any matter, whatsoever, relevant to dispute or difference referred to arbitrators. The arbitration proceedings shall be held in Delhi only. The language of proceedings that of documents and communication shall be English.

- (b) The Employer at the time of offering the panel of Arbitrator(s) to be appointed as Arbitrator shall also supply the information with regard to the qualifications of the said Arbitrator nominated in the panel along with their professional experience, phone nos. and addresses to the contractor.*
- (c) The award of the sole Arbitrator or the award by majority of three Arbitrators as the case may be shall be binding on all parties. ”*

13. In the light of aforesaid Clause-17, this Court has gone through the various decisions relied upon by learned counsel for respondent in this case. This Court finds that reliance placed upon decision of a Coordinate

Bench of this case in ***URC Constructions(P) Ltd (Supra)***, is distinguishable on facts as in the said case, the respondent therein had consented before the Court that out of panel of five, respondent shall nominate its Arbitrator and thereby arbitral tribunal was constituted, whereas in the case in hand parties have no consensus on the appointment of arbitral tribunal. Next, reliance was placed upon decision in ***Minesh Chopra (Supra)***, wherein consequent upon demise of learned Arbitrator, the respondent had arbitrarily appointed substituted Arbitrator without consent of petitioner and therefore, mandate of arbitral tribunal was substituted. Also, reliance was placed upon another decision of a Coordinate Bench of this Court in ***M/s IWORLD Business Solutions Private Limited (Supra)*** therein the plea of respondent -DMRC seeking appointment of three arbitrators was allowed in view of the fact that the panel of arbitrators, forwarded by the respondent to the petitioner, consisted of three Retired Additional District Judges, which in the opinion of the Court could not be doubted.

14. Further, reliance was placed upon another decision dated 07.04.2021 in O.M.P. (T) (COMM.) 30/2021, ***Iworld Business Solutions Private Ltd. (Supra)***. wherein the facts of the said case were similar to

that of O.M.P. (T) (COMM.) 71/2020, titled as ***M/s IWORLD Business Solutions Private Limited (Supra)*** and therefore, the mandate of arbitral tribunal was upheld.

15. Reliance was also placed upon Hon'ble Supreme Court decisions in ***Central Organization for Railway Electrification (Supra)*** and ***Special Leave to Appeal (C) No(s). 12670/2020 Union of India Vs. M/S Tania Constructions Limited.***

16. This Court is conscious that decision of Hon'ble Supreme Court in ***Central Organization for Railway Electrification (Supra)*** has been referred to the Larger Bench for consideration, however, it is still pending adjudication and, therefore, holds the field and so, has been relied upon by different Coordinate Benches of this Court in various decisions.

17. The Hon'ble Supreme Court in ***Central Organization for Railway Electrification (Supra)*** rejected the decision of High Court appointing independent arbitrator, without resorting to the procedure for appointment of arbitrators as prescribed under the GCC and held as under:-

“19. After coming into force of the Arbitration and Conciliation (Amendment) Act, 2015, when Clause 64 of the General Conditions of Contract has been modified inter alia providing for constitution of Arbitral Tribunal

consisting of three arbitrators either serving or retired railway officers, the High Court is not justified in appointing an independent sole arbitrator without resorting to the procedure for appointment of the arbitrator as prescribed under Clause 64(3)(b) of the General Conditions of Contract.

20. It is pertinent to note that even in the application filed under Section 11(6) of the Arbitration and Conciliation Act, 1996, the respondent prayed for appointment of a sole arbitrator in terms of Clause 1.2.54(b)(i) of the Tender Agreement/Clause 64 of the General Conditions of Contract for adjudicating the disputes which have arisen between the parties. In the petition filed under Section 11(6) of the Act, the respondent prayed for appointment of one Shri Ashwani Kumar Kapoor to act as the arbitrator. Thus, the respondent itself sought for appointment of arbitrator in terms of Clause 64 of the General Conditions of Contract. The appointment of Shri Ashwani Kumar Kapoor as arbitrator, of course, was not agreeable to the appellant, since it was found that said Shri Ashwani Kumar Kapoor was not in the panel of arbitrators and therefore, could not be considered for appointment as arbitrator. As the value of the work contract was worth more than Rs 165 crores, the dispute can be resolved only by a panel of three arbitrators in terms of Clause 64(3)(b) of the General Conditions of

Contract. The respondent was not right in seeking for appointment of a sole arbitrator in terms of Clause 1.2.54(b)(i) of the tender agreement/Clause 64 of the General Conditions of Contract.”

18. In the present case also, the relevant Clause- 17 mandates that for claim above Rs.5 million, a panel of five Arbitrators shall be provided by the respondent, which may also include DMRC officers and the Contractor and employer shall have to choose the sole Arbitrator each from the said panel and the two so chosen will choose the third arbitrator from the panel only. In a catena of decisions, the Hon’ble Supreme Court has made it clear that the arbitration agreement is sacrosanct and there can be no deviation therefrom.

19. With regard to plea of petitioner that in view of Section 12 of the Act, the panel of Arbitrators proposed by the respondent in terms of Clause-17.9 stand disqualified, the Hon’ble Supreme Court in ***Central Organization for Railway Electrification (Supra)*** while dealing with the contention of respondent therein that under the provisions of Section 12(5) of the Act, the panel of arbitrators drawn out of railway employees or ex railway employees, make them statutory ineligible, observed as

under:-

“27. XXXXX

As held in Voestalpine Schienen GmbH , the very reason for empanelling the retired railway officers is to ensure that the technical aspects of the dispute are suitably resolved by utilising their expertise when they act as arbitrators. Merely because the panel of the arbitrators are the retired employees who have worked in the Railways, it does not make them ineligible to act as the arbitrators.”

20. In view of the above, the plea urged by petitioner seeking appointment of sole Arbitrator and disqualification of panel of proposed/nominated Arbitrators by the respondent being hit by provision of Section 12 of the Act, is not maintainable.

21. Also, the Hon'ble Supreme Court in ***Central Organization for Railway Electrification (Supra)***, observed and held as under:-

“39. There is an express provision in the modified clauses of General Conditions of Contract, as per Clauses 64(3)(a)(ii) and 64(3)(b), the Arbitral Tribunal shall consist of a panel of three gazetted railway officers [Clause 64(3)(a)(ii)] and three retired railway officers retired not below the rank of Senior Administrative Grade Officers [Clause 64(3)(b)]. When the agreement specifically

provides for appointment of the Arbitral Tribunal consisting of three arbitrators from out of the panel of serving or retired railway officers, the appointment of the arbitrators should be in terms of the agreement as agreed by the parties. That being the conditions in the agreement between the parties and the General Conditions of the Contract, the High Court was not justified in appointing an independent sole arbitrator ignoring Clauses 64(3)(a)(ii) and 64(3)(b) of the General Conditions of Contract and the impugned orders cannot be sustained.”

22. Moreover, afore-noted Clause-17 of the GCC stipulates that the Arbitrator(s) shall be appointed within a period of 30 days from the date of receipt of written notice/ demand of appointment of Arbitrator from either party and respondent vide its letter dated 20.07.2021 nominated panel of five Arbitrators, that is very well within the time prescribed. Hence on this Count also, this petition does not stand.

23. In the light of aforesaid, the present petition is dismissed while directing the petitioner to appoint its Arbitrator strictly in terms specified in Clause- 17 of the General Conditions of Contract (GCC) forming Agreement dated 23.05.2014. Meaning thereby, petitioner shall nominate its Arbitrator out of panel of five Arbitrators proposed by respondent's

letter dated 20.07.2021 and respondent shall also nominate its Arbitrator therefrom and the two Arbitrators so appointed shall choose the third Arbitrator to complete the Arbitral Tribunal to resolve the disputes between the parties.

24. The present petition is accordingly disposed of.

(SURESH KUMAR KAIT)
JUDGE

OCTOBER 28, 2021
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