

\$~32 (2020)

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

Date of Decision: 19th July, 2021

+ **ARB. P. 639/2020, I.A. 1289/2021 & I.A. 4631/2021**

TRIMAX IT INFRASTRUCTURE AND SERVICES LTD.

..... Petitioner

Through: Mr. Jeevesh Nagrath, Mr. Chitvan
Singhal and Mr. Chandan Dutta,
Advocates.

versus

DELHI TRANSPORT CORPORATION

..... Respondent

Through: Mr. Aviral Saxena and Mr. A.
Mishra, Advocates.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

JUDGMENT

[VIA VIDEO CONFERENCING]

SANJEEV NARULA, J. (Oral):

1. The existence of arbitration agreement between the parties is not in dispute, yet Delhi Transport Corporation rigidly opposes this petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 [hereinafter, '*the Act*'] seeking appointment of a sole arbitrator. Let's examine the merits of the objections.

2. The factual matrix is as follows:

- (i) Pursuant to a request for proposal issued in January, 2015 by the Respondent, the Petitioner submitted a bid. It was declared to be the successful bidder, and this led to issuance of Letter of Acceptance dated 1st September, 2015. A formal Work Order was executed shortly thereafter on 30th September, 2015. The said agreement contains an Arbitration Clause, which reads as under:

“5.2 Settlement of Disputes

A. Performance of the contract is governed by the terms & conditions of the contract. In case of dispute arises between the parties regarding any matter under the contract, either party the contract may send a written notice of dispute to the other party. The party receiving the notice of dispute will consider the notice and respond to it in writing within 30 days after receipt.”

B. Arbitration:

i. Amicable Resolution

1. Save where expressly stated otherwise in this Agreement. Any dispute, difference or controversy of whatever nature howsoever arising under, out of or in relation to this Agreement between the Parties and so notified in writing by either Party to the other (the "Dispute") in the first instance shall be attempted to be resolved amicably by the Parties and failing such resolution of the same in accordance with the procedure set forth in sub-article (2) below.

2. Either Party may require the Dispute to be referred to the Chairman-cum-MD, DTC and CEO of the prospective IA or any officer/executive authorized by them for amicable settlement. Upon such reference, both the Parties and the CMD or his nominee shall meet at the earliest mutual convenience and in any event within 15 (fifteen) days of such reference to discuss and attempt to amicably resolve the Dispute. If the Dispute is not amicably resolved within 15 (fifteen) days of such meeting, the Party may approach for reference of Dispute to arbitration in accordance with the provisions of indicated below.

ii. Appointment of Arbitrator

1. Any dispute which is not resolved amicably as provided in Amicable Resolution: point no-1, then the same shall be referred to the Sole Arbitrator CMD, Delhi Transport Corporation or to some other person appointed and nominated by him/her. There will be no

objection to the contractor that the arbitrator is an employee or the Delhi Transport Corporation that he had dealt with matters to which contract relates or that in the course of his duties as an employee of DTC he had expressed his opinion or views on all or any of the matter in dispute or difference.

2. In the event of Arbitrator dying, neglecting or refusing to act or resigning or unable to act for any reason or his award being set aside by the court for any reason, it shall be lawful for the authority appointing the arbitrator to appoint another arbitrator in place of outgoing arbitrator in the manner aforesaid. (Emphasis Supplied)”

- (ii) According to the Petitioner, they started fulfilling their obligations under the aforementioned agreement, but the Respondent did not extend its cooperation. Hinderances were created to ensure that Petitioner did not achieve critical milestones as envisaged under the agreement. Despite that, Petitioner raised invoices in conformity with the agreement, to which no dispute was raised by the Respondent, yet, payments were not made.
- (iii) In the meantime, on a petition filed by a financial creditor against the Petitioner under Section 7 of the Insolvency and Bankruptcy Code, 2016 [*hereinafter referred to as ‘IBC’*], the learned NCLT, *vide* order dated 21st February, 2019 appointed an Interim Resolution Professional [*hereinafter referred to as ‘IRP’*] to take over the management of the Petitioner.
- (iv) On 23rd December, 2019, the Petitioner sent a letter to the Respondent regarding outstanding payments, pointing out that it was becoming difficult for them to pay its vendors. The Respondent, in response thereto, on 8th January, 2020 sent a letter to the IRP and levied a penalty

of Rs. 91 Crores on the Petitioner; which was questioned and contested by the Petitioner in its letter dated 9th January, 2020. This also led to filing of a petition under Section 9 of the Act before the District Court [being O.M.P.(I) (COMM.) 15/2020] by the Petitioner, wherein an injunction order dated 23rd January, 2020 was passed restraining the Respondent from encashing the Petitioner's Bank Guarantee of Rs. 2 crore which had been furnished under the agreement. In this background, several communications were exchanged between the parties. Ultimately, the Petitioner invoked arbitration through a notice dated 26th February, 2020 and proposed the name of a retired judge of this Court as a Sole Arbitrator to adjudicate the disputes between the parties.

- (v) The Respondent acknowledged the notice and replied *vide* letter dated 18th March, 2020, raising counter issues, rejecting the Petitioner's appointment, and further unilaterally appointing a retired IAS officer as the Arbitrator.
- (vi) The Petitioner, on being informed about the appointment, *vide* letter dated 21st March, 2020, rejected the same on account of unilateral appointment being conflict with the arbitration mechanism envisaged under the Act, as interpreted by the Supreme Court in ***Perkins Eastman Architects DPC And Ors. v. HSCC (INDIA) Ltd.***¹
- (vii) On 3rd June, 2020, the Arbitrator appointed by the Respondent

¹ AIR 2020 SC 59.

communicated his withdrawal of consent to be appointed, in view of the Petitioner's objection regarding unilateral appointment.

3. In this backdrop the Petitioner has approached this Court seeking appointment of an independent Sole Arbitrator.

4. Mr. Mishra, learned counsel for the Respondent, objects to the present petition on following grounds:

- (i) The notice invoking arbitration is invalid. Pursuant to the proceedings before the NCLT, moratorium under Section 14 of the IBC had kicked in w.e.f. 21st February, 2019. On 15th November, 2019, in the 12th meeting of the Committee of Creditors, a resolution plan was approved, which was accepted by the NCLT on 4th May, 2020. During this period, in terms of Section 17 of the IBC, the IRP was in control of the management of the Petitioner company. Yet, the notice invoking arbitration dated 26th February, 2020 was issued by the Petitioner, which was not in control of its affairs and management of the company, and had no authority to issue said notice. This notice, lacking IRP's consent, is inconsequential, and thus, there is no invocation of arbitration in the eyes of law, which is a mandatory requirement for initiating arbitration proceedings. Reliance is placed upon the judgment of this Court in *Alupro Building Systems Pvt. Ltd. v. Ozone Overseas Pvt. Ltd.*²

² 2017 SCC OnLine Del 7228.

(ii) The present petition under Section 11 of the Act is not maintainable. Pursuant to the notice invoking arbitration, the Respondent has proceeded to exercise its rights and appointed an arbitrator. The remedy available with the Petitioner, if any, lies under Section 14 and not under Section 11 of the Act. In support of this contention, reliance is placed upon the judgment of the Allahabad High Court in *Deepak Goel v. Sri Avinash Chandra And Ors.*³

(iii) The resolution plan would come into force only if the conditions specified therein were fulfilled. Since the Petitioner has failed to fulfil the same, it cannot be said that the resolution plan has been accepted, implemented or approved.

5. In response to the aforesaid objections, Mr. Jeevesh Nagrath, learned counsel for the Petitioner submits as follows:

(i) The initiation of arbitral proceedings was in consultation with the IRP. This is evident from the fact that on 31st January, 2020, the IRP had issued a *vakalatnama* in favour of the counsel who was representing the Petitioner company in the proceedings under Section 9 of the Act.

(ii) The present petition was subsequent to the order dated 4th May, 2020, whereby the learned NCLT accepted the approval of the resolution plan. Since no proceedings are pending under the IBC, there is no

³ Order dated 17 February, 2020 in Arbitration Application No. 49 of 2019.

embargo in law preventing the Petitioner from filing the present petition.

- (iii) The Respondents have not denied the existence of the Arbitration Agreement. In fact, pursuant to the notice invoking invocation, the Respondent themselves proceeded to make an appointment of an Arbitrator, although the same is in clear violation of the judgment of the Supreme Court in *Perkins (supra)*.

6. On consideration of the rival contentions of the parties, the court is of the opinion that objections raised by the Respondent are completely devoid of merit.

7. Concededly, on 4th May, 2020, the learned NCLT, Mumbai, accepted the resolution plan. The legal status of the Petitioner Company has not been altered and continues to exist under the same name. There is no insolvency proceeding pending against the Petitioner. The embargo, if any, that existed on account of the moratorium, stands lifted and there cannot be any objection with respect to the maintainability of the present petition.

8. Next, we shall deal with the objection regarding invocation of appropriate provision under the Act viz Section 11. Filing of the present petition was preceded by issuance of a notice of invocation whereby the Respondent was informed of the disputes as well of the Petitioner's desire to go for arbitration. The Respondent, upon the receipt of the notice, did not raise any objection regarding the prevalence of dispute, rather raised

counter-issues; agreed for arbitration, but instead appointed an arbitrator unilaterally. This indicates that Respondent was also interested in reference to arbitration, albeit to an arbitrator of its choice. Although the arbitration clause, as worded, gives unilateral right to the Respondent to make an appointment, but in view of the authoritative pronouncement of the Supreme Court in *Perkins (supra)*, exercise of this right is impermissible. Be that as it may, the arbitrator nominated by the Respondent never accepted the appointment and did not enter upon the reference. Since there is no arbitral tribunal in existence, the Petitioner cannot be compelled to seek termination of its mandate under Section 14, or be denied from seeking appointment of the arbitral tribunal under Section 11 of the Act.

9. The contention relating to the resolution plan not being adhered to, by the Petitioner is likewise flawed. During the course of the arguments, counsel for the Respondent urged that a petition assailing the order dated 4th May, 2020 is pending before the NCLAT wherein they have prayed for appointment of a new resolution professional. The filing of such an appeal would not have any impact on the present proceedings. It is not disputed that till date, no order has been passed staying the NCLT's order or declaring the resolution plan to be invalid. The court shall also not entertain the Petitioner's contentions that the Resolution plan has been prepared in violation of the provisions of the IBC. It is not the remit of this court to declare that the resolution plan is invalid/not in force or that the Petitioner has not complied with the conditions stipulated therein. Remedy available to the Respondent, if any, would lie only with the company law tribunals under the IBC.

10. The objections raised by the Respondent are frivolous and raised only with the intent to delay the present proceedings, which cannot be countenanced. The present petition is allowed.

11. Accordingly, Hon'ble Mr. Justice J.R. Midha, (Retd.) Judge, High Court of Delhi (Mobile No. 9717495003) is appointed as a Sole Arbitrator to adjudicate the disputes that have arisen between the parties under Work Order dated 30th September, 2015.

12. The parties are directed to appear before the learned Arbitrator, as and when notified. This is subject to the learned Arbitrator making the necessary disclosure under Section 12(1) of the Act and not being ineligible under Section 12(5) of the Act.

13. The learned Arbitrator will be entitled to charge his fees in terms of the provisions of the Fourth Schedule appended to the Act.

14. It is clarified that the Court has not examined any of the claims of the parties and all the rights and contentions of the parties on merits are left open. Both the parties shall be free to raise their claims/ counter-claims before the learned Arbitrator in accordance with law.

15. Since the objections raised by the Respondent are completely frivolous, a cost of Rs. 10,000/- is imposed on the Respondent which is directed to be paid to the Petitioner.

16. At this stage Mr. Nagrath, counsel for the Petitioner submits that in view of the fact that the resolution plan has been approved and accepted by the NCLT, the Respondent are precluded from now making any claim before the learned arbitrator in respect of the disputes arising from the agreement in question. He argues that the alleged claim of the Respondent has extinguished since the same was not made before the IRP and does not form part of the Resolution Plan; and besides, the alleged claim of the Respondent is barred in terms of section 31(1) of the IBC. The court is leaving this question open. In the event the Respondent raises a claim before the learned arbitrator, the Petitioner shall be free to raise all objections including the plea of claims being non-arbitrable, inter-alia on the grounds noted above. The same shall be adjudicated by the learned Arbitrator, in accordance with law. All the rights and contentions of the parties regarding the merits of the claims or the legal objections regarding the maintainability thereof are left open.

17. In view of the above, the present petition is allowed and stands disposed of. The pending applications also stand disposed of.

SANJEEV NARULA, J

JULY 19, 2021

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