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

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Date of Decision 05.07.2022+ **ARB.P. 576/2022****M/S K.B.G. ENGINEERS**

..... Petitioner

Through: Mr. Avinash Trivedi, Advocate.

versus

**DELHI TOURISM AND TRANSPORTATION DEVELOPMENT
CORPORATION LTD.**

..... Respondent

Through: Mr. Abhimanyu Garg, Advocate

CORAM:**HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA****NEENA BANSAL KRISHNA, J. (ORAL)**

1. The present petition under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as 'The Act'*) has been filed on behalf of the petitioner for appointment of an Arbitrator.
2. Facts in brief are that the petitioner is a registered partnership firm and is doing the work of construction in Government and private department since long time. The petitioner was declared successful participant in the Tender published for the execution of the work of "upgradation/Construction of Sub-



Registrar Office at DC(South East) Office Complex Gargi College, Lajpat Nagar, New Delhi, SH: Civil work i/c Furniture, Electric and HVAC Work”. After completion of all the formalities, Acceptance Letter bearing no. DTTDC/Engg./I(196)/EE(PB-III)/2405 dated 30.07.2014 was awarded to the petitioner.

3. The performance guarantee in terms of the Letter of Acceptance was submitted after which the Agreement bearing No. 7/EE(PB-III)/DTTDC/Engg/2014-15 for execution of work for a total contractual amount of Rs. 2,13,59,777/- was entered into between the parties. The date of the commencement of the work was 14.08.2014 and the date of completion was 11.12.2014. The petitioner immediately started the execution of work on issuance of Acceptance Letter but it faced many hindrances during the course of execution of the work at site which were ultimately completed on 28.09.2015. Thereafter, petitioner submitted his Final Bill and Statements of 10CA and 10C vide its letter dated 14.05.2018 and 18.10.2018 against which some payments were made by the respondent in the month of August, 2020.

4. The officers of the respondent failed to make payments of the entire amount despite repeated requests; the petitioner thus sent a letter dated 20.05.2020 to the Executive Engineer to release the entire amount. He also submitted letter dated 21.05.2020 in the office of Chief Project Manager of respondent reiterating its claims and invoking Arbitration clause 25 of GCC of the Agreement. The Superintendent Engineer of the respondent department sent a reply on the pretext that some Undertaking has already been given by the petitioner at the time of release of the Final Bill. The petitioner again submitted



a letter dated 20.06.2020 to the Managing Director of respondent. The Chief Engineer of the respondent sent a reply dated 15.07.2020 requesting him to approach Superintending Engineer of respondent in terms of Clause 25 of GCC. A letter dated 10.08.2020 was accordingly submitted to the Superintending Engineer for settlement of disputes and for referring the matter for appointment of Arbitrator for adjudicating of disputes to which a reply dated 04.09.2020 was sent from Chief Engineer of the respondent reiterating the averments made in the letter dated 15.07.2020. The petitioner then submitted a letter dated 21.12.2020 to Chief Engineer of respondent in terms of Clause 25 of the GCC Agreement for settlement of disputes but since no reply came forth, he submitted another letter dated 27.08.2021 to the Managing Director of the respondent despite which the respondent has failed to constitute the Dispute Resolution Committee or to pay the claimed amount along with the interest. It also failed to take any steps for the appointment of the Arbitrator; hence the present petition has been made for appointment of the Arbitrator.

5. The valuation of the subject matter has been done at approximately Rs.10,23,082/- alongwith interest @ 18% per annum from the due date till the date of payment to the petitioner.

6. Learned counsel for the respondent has taken objection that the petitioner had already accepted the Full and Final payment and had even furnished an Undertaking to this effect of final payment and, therefore, there exists no dispute referable to the arbitration. The second ground on which the petition has been challenged is that there is a procedure prescribed for settlement of dispute which has not been followed by the petitioner.



7. Submissions heard.
8. **My observations** are as under:
9. The existence of the Arbitration Agreement is not in dispute. The objection taken by the respondent is that the petitioner had given an Undertaking having received the final amount from the respondent. In this regard it may be observed that the jurisdiction of this Court under section 11(6A) of the Arbitration and Conciliation Act, 1996 is limited. The law on this aspect is established after the Amendment of Section 11 subsequent to insertion of sub clause 6A the jurisdiction of this court is limited only to the examination of existence and validity of an Arbitration Clause. It is only when the court finds that on prima facie basis the claims are ex facie not arbitrable that the petition for referring the dispute to arbitration may be rejected. In *Vidya Drolia and Ors vs. Durga Trading Corporation, (2019) SSC online SC 358* it was observed that when there is a doubt about the authenticity of the claim, the thumb rule is that “when in doubt, do refer”. The issue raised by the respondent is arguable for it requires determination whether the final payment has been received by the petitioner and the said disputed question of fact cannot be considered under section 11(6) of the Act which has a very limited scope. The circumstances in which the Undertaking was executed and whether it was in complete discharge of the contractual obligations of the petitioner absolving the respondent of all its liability, is a disputed fact which cannot be determined in the present petition under Section 11 of the Act.
10. The other objection taken is that Section 25 of GCC of the Agreement provides for a detailed procedure to be followed for referring the matter for



settlement/referring the matter to Arbitration. The petitioner has explained that when his request for payment of the balance amount was not responded to by the respondent he submitted a letter dated 20.5.2020 to the Executive Engineer. He also submitted letter dated 21.5.2020 to the Chief Project Manager reiterating his claim and for invoking the Arbitration Clause. Thereafter, he wrote a letter to the Superintending Engineer and another letter dated 20.6.2020 to the Managing Director of the respondent in terms of 25 GCC of the Agreement. Though their responses were received but neither the Dispute Resolution Committee was appointed nor were any steps taken for appointment of the Arbitrator by the respondent. In the circumstances, it cannot be said that the petitioner has not followed the due procedure for resolution of dispute and untimely invoking arbitration.

11. In the face of inaction of the respondent to either supply the claim or to constitute a Dispute Resolution Committee or to appoint an Arbitrator, the intent of Clause 25 has been completely defeated by the conduct of the respondent and the petitioner cannot be relegated back to the mechanism as provided under Clause 25 of GCC when the same has been followed and complied with by the petitioner in true intent and spirit.

12. The petitioner is, therefore, allowed and Shri Satyam Thareja, Advocate, (Enrolment No. D/1050/2012, Mobile No.9711097019) is hereby appointed as an Arbitrator.

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



Act.

14. The Arbitrator will be entitled to charge his/her fee in terms of the provisions of the Fourth Schedule appended to the Act.

15. In view of the above, the present petition is allowed. All pending applications, if any, also stand disposed of accordingly.

NEENA BANSAL KRISHNA, J

JULY 5, 2022/PA

