



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

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Reserved on: 05<sup>th</sup> July, 2022

Decided on: 28<sup>th</sup> July, 2022

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**ARB.P. 577/2022**

M/S K.B.G ENGINEERS

..... Petitioner

Through: Mr. Avinash Trivedi, Advocate.

versus

DELHI TOURISM & TRANSPORTATION DEVELOPMENT  
CORPORATION LTD.

..... Respondent

Through: Mr. Siddhant Nath, Advocate.

**CORAM:**

**HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA**

**J U D G E M E N T**

1. A petition under Section 11 of the Arbitration & Conciliation Act, 1996 has been filed for appointment of an Arbitrator.
2. The facts in brief as narrated in the petition are that the petitioner a registered partnership firm, was awarded the Tender *vide* Acceptance Letter bearing No. DTTDC/ENGG/I(196)/EE(PB)-III/135 dated 12<sup>th</sup> June, 2015 awarding the work to the petitioner. A Performance Guarantee of Rs. 22,05,696/- in the shape of Bank Guarantee dated 17<sup>th</sup> June, 2015 and of Rs. 6,35,000/- dated 18<sup>th</sup> June, 2015, were submitted. The Letter of Commencement of Work dated 19<sup>th</sup> June, 2015 was issued in favour of the petitioner. The Agreement bearing No. 02/EE(PB)-III/DTTDC/ENGG/2015-16 for execution of work for total contract amount of Rs. 44,11,391/- was issued. The stipulated date of commencement of work was 27<sup>th</sup> June,



2015 and completion was 23<sup>rd</sup> December, 2015 as per the terms of the Contract.

3. The petitioner has submitted that work could not be completed within the stipulated period in view of the hindrances faced by the petitioner at site which were not attributable to it and led to delay in completion of work which could be completed ultimately on 11<sup>th</sup> April, 2016, for which a Completion Certificate was duly issued by the respondent. The petitioner wrote a Letter dated 19<sup>th</sup> December, 2019 requesting the respondent to release the amount of Rs. 33,43,601/- which was withheld from the Final Bill passed on 22<sup>nd</sup> February, 2020. Having not received any response, the petitioner invoked Clause 25 of the Agreement *vide* his Letter dated 20<sup>th</sup> May, 2020 addressed to the respondent.

4. The CE of the respondent gave a Reply dated 19<sup>th</sup> June 2020 denying the contents of the letter of the petitioner. The respondent further directed the petitioner to invoke the Arbitration Clause by writing to the SE of the respondent in the first instance in terms of Clause 25 of GCC. The petitioner invoked the Arbitration Clause and wrote to the SE *vide* its Letter dated 10<sup>th</sup> August, 2020.

5. The respondent gave a Reply dated 04<sup>th</sup> September, 2020 reiterating its stand as taken in the previous correspondence. The petitioner then submitted a Letter dated 21<sup>st</sup> December, 2020 to the Chief Engineer but when no reply was received, the petitioner wrote Letter dated 21<sup>st</sup> December, 2020 requesting for appointment of the Arbitrator. When no response was received, he wrote a Letter dated 20<sup>th</sup> October, 2021 to the Managing Director and Chief Engineer requesting them to refer the matter to DRC. However, the respondent did not constitute the DRC, nor pay the



claim amount with interest and failed to take any steps for appointment of the Arbitrator.

6. The petitioner then again wrote a Letter dated 29<sup>th</sup> January, 2022 requesting the Managing Director to appoint the Arbitrator within seven days for adjudication of the disputes.

7. It is submitted that disputes have arisen between the parties for release of the arrears of amount which the respondent has failed to pay despite repeated requests and letters. A prayer is, therefore, made that the Arbitrator may be appointed.

8. No formal reply nor any written submissions have been filed on behalf of the respondent.

9. Learned counsel on behalf of the respondent, however, has submitted that a full and final bill had been raised and accepted by the petitioner in April, 2022 and had also given an undertaking recording satisfaction. Having received the entire amount pursuant to the full and final bill, no arbitrable dispute remains between the parties and the present petition is liable to be dismissed.

10. Reliance has been placed on the case of *Vidya Drolia vs. Durga Trading Corp.* Civil Appeal No. 2402/2019 decided on 14<sup>th</sup> December, 2020, wherein the Hon'ble Supreme Court has clearly stated that disputes which are not arbitrable shall not be referred to the arbitration. Learned counsel has also relied on the case of *Smaritan Consultancy and Tech. Services vs. Union of India & Ors.* MANU/RH/0650/2021, wherein a reference has been made to the case of *Vidya Drolia* (supra) to observe that pursuant to the insertion of Section 11(6)(a) in the A&C Act of 1996, the Court pursuant to an application under Section 11(6) of the A&C Act, 1996 has to follow the



appointment of an Arbitrator as a rule. The only exceptions are when the Arbitration Agreement is manifestly non-existent/invalid or the disputes are ex-facie non-arbitrable. It had been further clarified in reference to *Vidya Drolia's* case (supra) that there is no absolute bar on the High Court to examine the existence of validity of the Arbitration Agreement in rare cases (with circumspection and demurer). The High Court can examine the existence and validity of the Arbitration Agreement. It was thus, concluded that a dispute which is ex-facie non-arbitrable would fall in excepted matters and may not be referred for arbitration.

11. It is further argued that the Final Bill was raised in February, 2019 while the present petition has been filed only in April, 2022. The date of completion of project was 11th April, 2016 and the last date of payment was 22<sup>nd</sup> February, 2019. It is evident that it is ex-facie barred by limitation. Reliance has again been placed on *Vidya Drolia* (supra). It is vehemently contended that the present petitioner is liable to be dismissed.

12. Learned counsel for the petitioner has relied on *M/s Thermal Engineers & Insulators Pvt. Ltd. vs. Delhi Tourism & Transportation Development Corporation Ltd.* Arb. Pet. No.1033/2021 dated 25<sup>th</sup> February, 2022, wherein while considering a similar objection in a petition under Section 11(6) of the A&C Act, 1996, it was observed that even though an Undertaking of final payment having been received, it is still a moot point about the circumstances under which such undertaking was executed and whether the same could be considered as a complete discharge of the contractual obligation of the respondent absolving him from all the liabilities. The dispute, therefore, requires adjudication and is referable to the Arbitral Tribunal. Furthermore, it cannot be over looked that



immediately after receiving the final bill, the petitioner has been regularly raising his claim for the balance amount by writing various letters to the respondent.

13. Submissions heard.

14. The respondent essentially has taken the following objections:

(i) The objections taken on behalf of the respondent are that there are no arbitrable disputes, as the petitioner had accepted final payment and had even given an Undertaking to this effect.

(ii) Moreover, Clause 25 of GCC contains the detailed procedure to be followed before invoking arbitration which the petitioner has failed to do; and

(iii) The claim is barred by limitation.

15. Essentially the objections taken by the respondent are in respect of the limitation and non-compliance of the procedures as entailed in Clause 25 of the GCC Act. It is admitted by the parties that Clause 25 of GCC provides for arbitration which reads as under:

**“CLAUSE 25**

***Settlement of Disputes & Arbitration***

*Except where otherwise provided in the Contract all questions and disputes relating to the meaning of the specifications, design, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the Contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:*



1) If the Contractor considers any work demanded of him to be outside the requirements of the Contract, or disputes and drawings, record or decision given in writing by the Engineer on any matter in connection with or arising out of the Contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the superintending engineer shall give his written instructions or decision within a period of one month from the receipt of the Contractor's letter.

If the superintending engineer fails to give his instructions or decision in Meriting within the aforesaid period or if the Contractor is dissatisfied with the Instructions or decision of the superintending engineer, the Contractor may, within 15 days of the receipt of the superintending engineer decision, appeal to the chief engineer who shall afford an opportunity to the Contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractor's appeal. If the Contractor is dissatisfied with this decision of the Chief Engineer, the contractor may within 30 days from the receipt of the Chief Engineer decision, appeal before the Dispute Redressal Committee (DRC) along with a list of disputes with amounts claimed in respect of each such dispute and giving reference to the rejection of his disputes by the Chief Engineer. The Dispute Redressal Committee (DRC) shall give his decision within a period of 90 days from the receipt of Contractor's appeal. The constitution of Dispute Redressal Committee (DRC) shall be as indicated in Schedule 'F'. If the Dispute Redressal Committee (DRC) fails to give his decision within the aforesaid period or any party is dissatisfied with the decision of Dispute Redressal Committee (DRC), then either party may within a period of 30 days from the receipt of the decision of Dispute Redressal Committee (DRC), give notice to the Chief Engineer for appointment of arbitrator on prescribed proforma as per appendix XV, failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator. It is the term of contract that each party invoking arbitration must exhaust the aforesaid mechanism of settlement of claims/ disputes prior to invoking arbitration.

2) Except where the decision has become final, binding and conclusive in terms of Sub Para (1) above, disputes or difference shall



*be referred for adjudication through arbitrator by a sole arbitrator appointed by the chief engineer, CPWD, in charge of the work there be no chief engineer, the additional director general, the director general of the concerned regional work CPWD or if there be no additional director general, the director of general of work, CPWD, if the arbitrator so appointed is unable or unwilling to act or resigns his appointment vacates his office due to any reason whatsoever, another sole arbitrator shall be appoint in the manner aforesaid. Such person shall be entitled to proceed with die reference from the stage at which it was left by his predecessor.*

*It is a term of this Contract that the party invoking arbitration shall give a list of disputes with amount claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the chief engineer of the appeal.*

*It is also a term of this Contract that no person other than a person appointed by such Accepting Authority as aforesaid should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.*

*It is also a term of this Contract that if the Contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-Charge that the final bill is ready for payment, the claim of the Contractor shall be deemed to have been waived and absolutely barred and the Employer shall be discharged and released of all liabilities under the Contract in respect of these claims.*

*The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or reenactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceeding under this clause, except for cases falling under para 2(i) or (ii).*

*It is also a term of this Contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs.1,00,000/- the arbitrator shall give reasons for the award.*



*It is also a term of the Contract that if any fees are payable to the arbitrator, these shall be paid equally by both the parties.*

*It is also a term of the Contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims.*

*The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid."*

16. There is no dispute in regard to the existence of the arbitration clause. Furthermore, the petitioner has given in detail that he had strictly followed the procedure as provided under Clause 25 by first approaching the SR and thereafter the Managing Director and then requesting for the constitution of DRC. However, when no response was received from the respondent, he was compelled to invoke the arbitration and has made request for appointment of the Arbitrator.

17. In the wake of a valid Arbitration Agreement, Mr. Satyam Thareja, Advocate (Enrolment No.D/1050/2012, Mobile No. 9711097019) is appointed as the Sole Arbitrator to conduct the arbitration under the aegis of Delhi International Arbitration Centre. The parties are at liberty to raise their claims objections including limitation before the learned Arbitrator.

18. This is subject to the learned Arbitrator making the necessary disclosure as required under Section 12(1) of the A&C Act, 1996 and not being ineligible under Section 12(5) of the Arbitration & Conciliation Act, 1996.



19. Accordingly, the petition is allowed in the above terms.

**(NEENA BANSAL KRISHNA)**  
**JUDGE**

**JULY 28, 2022**

*va*

