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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Decided on: 19th September, 2022

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ARB.P. 912/2022**ABHI ENGG CORPORATION PVT LTD.**

Through its authorised representative,
Having its registered office at:
404, 405 Gomti Apartment 4th Floor
Law college SQR, WHC Road Dharampeth
Nagpur, Maharashtra - 440010

..... Petitioner

Through: Mr. Brijesh Kumar Goel & Mr.
Rajeev Kumar, Advocates.

versus

NTPC LTD.

Through its authorised representative,
Having its registered office at:
NTPC Bhawan, Scope Complex,
7-Institutional Area, Lodhi Road,
New Delhi-110003

..... Respondent

Through: Mr. Adarsh Tripathi & Mr. Vikram S.
Baid, Advocates.

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

1. The present petition has been filed under Section 11(6) of the Arbitration and Conciliation, 1996 (hereinafter referred to as "A&C Act, 1996") on behalf of the petitioner seeking appointment of a Sole Arbitrator to adjudicate the disputes between the parties.

2. The facts in brief are that the respondent-Company awarded the subject package, namely, 'construction of starter dyke up to EL PLUS 338.00 M at Village Ghamota in contiguity with existing Dhanras dyke for



NTPC Korba' to the petitioner-Company vide its Letter of Award/Purchase Order dated 09th May, 2020 amounting to work value about Rs. 51.24 crores with the completion period of 24 months, starting from 05th August, 2020 to 04th August, 2022. Pursuant to the issuance of Letter of Award, the parties entered into and signed the Contract Agreement dated 10th October, 2020.

3. It is submitted that the respondent, however, did not intimate the date of start of the work in the first 8 months. The petitioner wrote a Letter dated 08th June, 2021 informing the respondent that the petitioner has elected to treat the Contract as voidable in terms of Section 19 of the Indian Contract Act, 1872. The respondent vide its Reply dated 06th July, 2021 intimated the petitioner that since issuance of NOC by the Pollution Control Board was still pending; the respondent had decided to abandon the entire Contract. The respondent also intimated vide its Letter dated 14th August, 2021 that the EMD BG amounting to Rs. 1.10 crores shall be returned to the petitioner upon short closing of this Contract.

4. The petitioner, therefore, invoked Clause 7.3 of General Conditions of Contract for settlement of disputes having so arisen, the petitioner served a Notice of Arbitration dated 14th June, 2022 requesting the respondent to notify the disputes/issues/claims therein. The respondent through its E-mail dated 12th July, 2022 acknowledged the Notice of Arbitration dated 14th June, 2022 of the petitioner called upon the petitioner for mutual consultation for settlement of disputes. In reply, the petitioner vide Letter dated 13th July, 2022 informed the respondent that the disputes can be settled through arbitration proceedings for which the petitioner is seeking an appointment of Arbitrator.

5. The petitioner has asserted that the arbitrable disputes have arisen



between the parties. Since the Appointing Authority i.e., CMD, NTPC Ltd which has been authorized to appoint any Sole Arbitrator, is directly in conflict of law as pronounced by the Hon'ble Supreme Court in Perkin Eastman Architects DPC & Anr. vs. HSCC (India) Ltd., in Arbitration Application No. 32/2017, Judgement dated 26th November, 2019. Hence, the present application has been filed for the appointment of the Sole Arbitrator.

6. **The respondent in its Reply has taken** a preliminary objection that as per the terms of the Agreement, a mechanism for disputes settlement was agreed between the parties. It was a three-tier mechanism commencing from Mutual Consultation; thereafter, Resolution of the said dispute by way of conciliation through Expert Settlement Council and if both the process fail, then the party may refer the matter to Arbitration.

7. In the present case, without seeking to resolve the disputes through mutual consultation, the petitioner has considered to invoke the Arbitration Clause. The respondent offered to the petitioner to come forth for mutual consultation, but the petitioner in its Reply has taken a stand that the disputes can be settled only through arbitration and has failed to follow the mechanism agreed by the parties for resolution of their disputes. It is, therefore, submitted that the present petition is premature and is liable to be rejected.

8. **Submissions heard.**

9. In the present case, admittedly, the Contract was awarded to the petitioner which was sought to be declared void by the petitioner and was abandoned by the respondent. The disputes have thus arisen between the parties. It is not in dispute that Clause 7 of General Conditions of Contract



provides for resolution mechanism which reads as under:

“7. Settlement of Disputes

7.1 Mutual Consultation

If any dispute of any kind whatsoever shall arise between the Employer and the Contractor in connection with or arising out of the Contract, including without prejudice to the generality of the foregoing, any question regarding its existence, validity or termination, or the execution of the Works, whether during the progress of the Works or after their completion and whether before or after the termination, abandonment or breach of the Contract, the parties shall seek to resolve any such dispute or difference by mutual consultation. If the parties fail to resolve such a dispute or difference by mutual consultation, then the dispute may be settled through Expert Settlement Council/Arbitration / other remedies available under the applicable laws.

7.2 Resolution of Dispute through Expert Settlement Council

If the parties fail to resolve such a dispute or difference by mutual consultation, the dispute if the parties agree, may be referred to Conciliation in cases involving disputed amount up to Rs 250 crores, which is to be arrived at considering the claim and counter claim of the parties to the dispute.

7.2.1 Invitation for Conciliation:

7.3 Arbitration”

10. From above clause, it is evident that there is a three-tier mechanism which is proposed for dispute resolution; these are Mutual Consultation, Resolution of Dispute through Expert Settlement Council and Arbitration.

11. It has been rightly argued on behalf of the learned counsel for the petitioner that the process of "conciliation" could be resorted to only if both the parties agreed. Since the petitioner was not agreeable to resolution



through conciliation, the Invocation of Arbitration cannot be held to be in non-compliance of mechanism agreed between the parties.

12. It is, however, agreed that the petitioner did not follow the "process of mutual consultation" which was the first step as envisaged in the Dispute Resolution Mechanism under the Contract, in case of disputes. The explanation sought to be given on behalf of the petitioner is that it is not a case where the disputes have arisen during the execution of the Contract. It is a case where the petitioner has sought to get the Contract voided, since it could not be initiated for 8 months and is a case of abandonment of the Contract by the respondent. The nature of disputes is such that it was not amenable to settlement through mutual consultation and looking at the nature of disputes, the only mechanism which could be effective was arbitration and thus, the petitioner has sought the resolution of disputes through arbitration.

13. Learned counsel on behalf of the respondent has relied upon on the decision in Union of India vs. Pradeep Vinod Construction Company (2020) 2 SCC 464, wherein it was observed that the parties have agreed to a procedure for appointment of the Arbitrators, then the Courts must be slow in not following the procedure and the parties must be directed to appoint the Arbitrators in accordance with their Mutual Agreement. In the said case, wherein the parties had agreed that the Arbitral Tribunal shall consist of a panel of three Gazetted Railway Officers and the same shall be selected from a panel more than three names to be provided by the Railways. It was observed that while nominating the Arbitrators, the Courts must be slow in interfering with the procedure agreed and the Arbitrator should be appointed.

12. Learned counsel on behalf of the respondent has also placed reliance



on the decision in Dharamdas Tirathdas Constructions Pvt. Ltd. vs. Government of India in Civil Misc. Case No. 1043/2003 decided on 07th May, 2022, Madhya Pradesh High Court. In the said case, the Arbitration Clause provided that in case of any work demanded from him which was outside the requirement of the contract or disputes any drawings and record etc., which was unacceptable to him, he shall promptly within 15 days request the Superintending Engineering for decision. If the Superintending Engineer failed to give any instructions in writing or the Contractor was dissatisfied, an Appeal could be preferred before the Chief Engineer, who would give his decision within 30 days. Even if thereafter, the Contractor not satisfied, he may give a Notice for appointment of the Arbitrator. The Contractor directly invoked the Arbitration Clause before submitting its claims before the Superintending Engineer within 15 days from the settlement of the bills. In that context, the application for appointment of the Arbitrator which was rejected by the Competent Authority, was found to be legal and the petition of the Contractor for appointment of the Arbitrator, was dismissed.

13. In the present case, it is not as if there was a detailed multiple-tier procedure given before the hierarchy of officers for addressing the grievances in regard to execution of the Contract of the petitioner. The first two tiers are mutual consultation and conciliation. As already nominated above, conciliation can take place only if both the parties consent. Rather, it is a case of abandonment of the Contract by the respondent due to inability to delay in issuance of NOC by the Pollution Control Board. Moreover, the first tier of dispute resolution was only to see if the parties could agree at any mutual settlement. As has been rightly argued on behalf of the petitioner,



the nature of disputes which had arisen between the parties was not of the kind which may see any fruitful result through mutual consultation. In this case, a reference may be made to the Judgement of Supreme Court in Demarara Distilleries Pvt. Ltd. vs. Demerara Distillers Ltd. (2015) 13 SCC 610, wherein it was opined that the relegation of the parties to the avenue of amicable resolution, when the an application under Section 11(6) of A&C Act, 1996 has been filed, would be unjustified as in case, where such relegation would be merely in the nature of an empty formality.

14. A reference has also been made to the decision of this Court in Kunwar Narayan vs. Ms Ozone Overseas Pvt Ltd and Anr. in ARB.P. 538/2020 decided on 10th February, 2021, wherein a similar mechanism for resolution of disputes was provided. Reliance has also been place on Demarara Distilleries Pvt. Ltd. vs. Demerara Distillers Ltd. (supra) and Ravindra Kumar Verma vs. BPTP Ltd. MANU/DE/3028/2014, wherein it was observed that nothing worthwhile would be achieved by relegating the parties to explore any avenue of amicable resolution. Besides, the appointment of an Arbitrator by this Court would not act as an impediment to the parties to resolve their disputes amicably should it be possible at any point of time.

15. In the present case, considering the nature of dispute, it may be an empty formality as observed above, to relegate the parties to first explore the possibility of mutual consultation. Moreover, this cannot be considered as a ground to dismiss the present petition under Section 11(6) of A&CAct, 1996.

16. Considering that there is a valid Arbitration Agreement between the parties and in the light of the facts and submissions made, Mr. O.P. Gupta,



District and Sessions Judge (Retd.), Mobile No. 9910384645, is hereby appointed as the independent Arbitrator to adjudicate the disputes between the parties.

17. The parties are at liberty to raise their respective objections before the Arbitrator.

18. The fees of the learned Arbitrator would be fixed in accordance with the Fourth Schedule to A&C Act, 1996 or as may be agreed between the parties and the Arbitrator.

19. This is subject to the Arbitrator making necessary disclosure as under Section 12(1) of A&C Act, 1996 and not being ineligible under Section 12(5) of the A&C Act, 1996. The parties are at liberty to approach the learned Arbitrator.

20. Learned counsels for the parties are directed to contact the learned Arbitrator within one week of being communicated a copy of this Judgement to them by the Registry of this Court.

21. The petition is accordingly disposed of in the above terms.

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(NEENA BANSAL KRISHNA)
JUDGE

SEPTEMBER 19, 2021
S.Sharma