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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: 27th May, 2022

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ARB.P. 792/2019**HARCHARAN DASS GUPTA**

.... Petitioner

Through: Mr. Virender Kumar Sharma, Adv.

versus

HINDUSTAN PRE-FAB LIMITED, & ANR

.... Respondents

Through: Mr. Parveen Kumar Mehdiratta,
Advocate for R-1.
Ms. Astha Gupta & Mr. Vimal Raj,
Advocates for R-2.**CORAM:****HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA****NEENA BANSAL KRISHNA, J. (ORAL)**

1. The present petition has been filed under Section 11 of the Arbitration and Conciliation Act, 1996 (*hereinafter referred to as 'A&C Act, 1996'*) for appointment of arbitrator by the petitioner.
2. The petitioner was awarded a work regarding construction of Police Post and Dog Kennels at Sector 3, Pushp Vihar, New Delhi *vide* Letter No. HPL/DGM(C)/TC/LOI/2014-15/162 dated 14th January, 2015. According to the stipulated terms, the date of start of work was 10th May, 2015 and was to be completed by 09th June, 2016 i.e., within a period of thirteen months. The work, however, got completed on 12th December, 2016. The final bill as raised by the petitioner was not paid by the respondent No.1. It is asserted that a sum of ₹3,01,72,704/- by way of Pre-Final bill of the undisputed items is due to the petitioner from respondent No.1.



3. It is submitted that the disputes arose between the parties. The procedure for appointment of arbitrator is laid down in Clause 27 of Special Conditions of Contract (*hereinafter referred to as 'SCC'*). In compliance to the same the petitioner has written to the DGM (C) of respondent No.1 a Letter dated 29th March, 2019 putting him to notice to take a decision on the subject matter within one month but he failed to give any decision compelling the petitioner to approach CMD of respondent No.1 by way of an appeal and also for appointment of an arbitrator, who was also required to give a decision within one month of the receiving of the letter of the petitioner. However, he failed to take any decision where upon the petitioner approached the CMD of respondent No.1 vide Letter dated 09th May, 2019 in terms of Clause 27 of SCC, but he also failed to give any decision. Hence, the petition has been filed for appointment of an arbitrator by this Court.

4. **The respondent No. 1 in his detailed reply** has asserted that it is the agent of respondent No.2 appointed to execute the work of construction of Police Post and Dog Kennels at Sector 3, Pushp Vihar, New Delhi. On 11th August, 2014, the respondent No.1 had floated the tender for and on behalf of respondent No.2. All the acts done by respondent No.1 were, therefore, for and on behalf of respondent No.2 being its agent. Moreover, as per Clause 28 of SCC, the respondent No.1 is liable to make the payments only as and when the corresponding payments are received from respondent No.2. On 15th November, 2016, the work was completed and on 21st November, 2016, the petitioner submitted a final bill for gross value of the work done of ₹10,45,97,527/-. After adjustment of already paid amount upto 10th RA bill and statutory deductions, net payable was ₹56,82,880/- which was also paid on 10th October, 2017. The respondent No.1 after the payment



of final bill released the performance bank guarantee on 07th March, 2018 and refunded ₹20,32,613/- on 03rd October, 2015 towards security deposit deducted from RA Bill as per the agreed clause. The contract was concluded to the satisfaction of the parties. The respondent No.1 has already made the payments and the contract had been fully discharged. It is also asserted that the final bills were fully settled and the present alleged claim is an afterthought and not maintainable. The petitioner had not raised any bills claiming ₹3,01,72,704/- as claimed in the Summary of Claims in the present petition. The petitioner ought to have submitted the bills in respect of the alleged claims along with tax invoice receipts as per Clause 12 of SCC which has not been done. It is asserted that the petition is not maintainable and is liable to be dismissed.

5. The respondent No.1 has further asserted that the present claim is barred by limitation. The contract was completed on 21st October, 2016 while the arbitration is sought to be invoked after a lapse of three years and the claim is, therefore, barred by limitation. Furthermore, within the terms of Clause 27 of SCC the petitioner has not exhausted all the mechanism for settlement of claims and, therefore, this petition is not maintainable. Moreover, as per Clause 27.2 of SCC if the parties do not specifically agree on appointment of arbitrator, no person other than a person appointed by CMD, HPL can act as arbitrator. Also, as per the terms of the contract, fee, if payable, to the arbitrator shall be paid equally by the petitioner and respondent No.2. The respondent No.1 has no liability towards payment of the fee of the arbitrator. It is, therefore, stated that the present petition is liable to be dismissed.

6. **The respondent No.2 in its detailed reply** has stated that the



petitioner is seeking appointment of the arbitrator in terms of Clause 27 of the SCC. It is explained by the Respondent No.2 that the project of construction of Police Post and Dog Kennels at Sector 3, Pushp Vihar, New Delhi was awarded by it to respondent No.1 M/s Hindustan Pre-Fab Limited and an Agreement dated 22nd February, 2010 was executed between respondent No.1 and respondent No.2. ₹9,41,00,000/- were sanctioned by Ministry of Home Affairs vide Letter dated 15th October, 2012 which was subsequently revised to ₹11,21,00,000/-. After the submission of revised estimate by respondent No.1, the MHA sanctioned a revised AA/ES of ₹11,21,00,000/- vide order dated 30th September, 2017.

7. It is further explained that respondent No.1 entered into an Agreement dated 08th May, 2015 with the petitioner/sub-contractor without the knowledge and consent of respondent No. 2 to which respondent No.2 is not a party. The disputes have arisen between the petitioner and respondent No.1 and respondent No.2 is in no way concerned with the disputes in the absence of any Agreement between petitioner and respondent No.2. The respondent No.2 is neither a signatory nor a party to the Agreement dated 08th May, 2015. The existence of the Agreement dated 08th May, 2015 came to the notice of respondent No.2 only after filing of the present petition.

8. It is further asserted that full payment of ₹11,16,94,175/- (after withholding 5% of the total fee as per Clause 3.3 of the aforesaid agreement dated 22nd February, 2010) was made to respondent No.1 till 30th September, 2017. The respondent No.2 has completed his obligations in terms of the Contract dated 22nd February, 2010 and is not responsible for the acts of respondent No.1. Clause 27 in terms of the Agreement dated 08th May, 2015 does not pertain to respondent No.2 and respondent No.2 is not bound



to comply with the terms of the Agreement.

9. Moreover, Clause 12.1 of the Agreement dated 22nd February, 2010 between respondent No. 1 and respondent No. 2, clearly provided that A&C Act, 1996 shall not be applicable to the arbitration under this Clause. On the other hand, Clause 27.2 Paragraph 5 of the SCC clearly envisioned resolution of dispute by resorting to provisions of A&C Act, 1996. Mere fact that respondent No.1 may have represented itself as an agent of respondent No.2 will not make respondent No.2 a party to the Arbitration Agreement in the absence of express approval, adoption, confirmation or ratification of the Agreement dated 08th May, 2015. There is no privity of contract between Petitioner and respondent No.2. The petitioner can only sue respondent No.1 and not respondent No.2 and the petition for appointment of arbitrator is not maintainable against the respondent No.2.

10. The Section 11 petition of the petitioner interestingly does not refer or allege the existence of any Arbitration Agreement between the petitioner and respondent No.2. The dispute is between the petitioner and respondent No.1 and the present petition is not maintainable against it.

11. Submissions heard.

12. The first objection taken on behalf of the respondent was that the contract was entered into between the petitioner and HPL, respondent no.1 and Respondent No.2-Delhi Police was not a party to the contract. Since there is no Arbitration Agreement between the petitioner and Respondent No.2, the present petition is not maintainable. Admittedly, an Agreement dated 22nd February, 2010 was entered into between the respondent No.1-M/s HPL and Respondent No.2-Delhi Police. The said Agreement authorized the executing agency i.e respondent No.1-M/s HPL to discharge



its duties and responsibilities of proper and timely completion of the project. The articles defining the scope of work included settlement of disputes and arbitration.

13. Clause 12 of the Agreement dated 22nd February, 2010 provide for settlement of disputes and arbitration. Clause 12.2 reads as under:

“12.2 For a Period of One Year from the date of handing over of Project, the Executive Agency shall redress/ resolve all disputes, if any, with Contractors/ Vendors etc. for and on behalf of Delhi Police and read with Clause 4.1 (E). The executing agency shall be responsible for settling disputes with Contractors for a period of one year.”

14. It is clearly indicated that respondent No.1 was acting for and on behalf of respondent No. 2 as an agent and was authorized to settle any dispute with the contractors or third parties which may arise in the execution of the contract.

15. Pursuant thereto, respondent No.1 M/s HPL was engaged as an executing agency for the project of construction of Police Post and Dog Kennels at Sector 3, Pushp Vihar, New Delhi vide letter No. HPL/DGM(C)/TC/LOI/2014-15/162 dated 14th January, 2015. Admittedly, the disputes have arisen in respect of the execution of the works between respondent No.1 i.e the executing agency and the petitioner. The respondent No. 1 has been acting for and on behalf of respondent No.2 and, therefore, respondent No. 2 is bound by the Agreement dated 8th May, 2015 entered into between respondent No. 1 and the petitioner on the other hand, in regard to execution of the contract. The SCC clearly stipulate for settlement of disputes through arbitration.

16. Clause 27 (ii) of the SCC provides as under:



“(ii) Except when the decision has become final, binding and conclusive in terms of sub para (I) about disputes or differences shall be referred for adjudication through arbitration by a sole arbitrator appointed by the CMD-HPL on behalf of Delhi Police and with the consent of the Delhi Police. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever, another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by its predecessor.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice nor appointment of arbitrator and giving reference to the rejection by the CMD-HPL of the appeal.

It is also a term of this contract that no person other than a person appointed by such CMD-HPL on behalf of Delhi Police and with the consent of the Delhi Police as aforesaid should act as arbitrator and if for any reason i.e not possible, the matter shall not be referred in arbitration at all.”

17. This Agreement also clarifies that the person authorized to appoint the arbitrator is CMD-HPL for and on behalf of the Delhi Police. Considering that the work had been executed by respondent No. 1 the executing agency as an agent of respondent No. 2, *prima facie* it is shown that there is an Arbitration Agreement existing between the petitioner and the respondents.

18. This court in M/s Harcharan Das Gupta v. Hindustan Pre-Fab Limited & Anr., Arb.P. 366/2019, decided on 11th January, 2022, had considered Clause 12 of the agreement dated 22nd February, 2010 between respondent Nos. 1 and 2 in conjunction with Clause 27 of SCC and concluded that from the conjunctive reading of the two clauses, it is *prima facie* established that there existed valid Arbitration Agreement between



petitioner & respondent No. 2.

19. The other objection which has been taken is that the entire amount has already been paid by respondent No.1 as received from respondent No.2, and therefore, there is no dispute between the petitioner and respondent No.1 and the arbitration clause cannot be invoked against it. The petitioner has raised a dispute in respect of the works that had been awarded to it by respondent No.2 through respondent No.1, its executing agency. The payments were to be made by the principal agency i.e respondent No.2 and respondent No.1 was merely an executing agency. The respondent No.1 may claim that it has paid the entire amount to respondent No.2, but the liability principally is that of respondent No.2 to settle the disputes in regard to payments and respondent No.1 being the agent of respondent No.2, and it cannot avoid the arbitration proceedings by claiming that it has already made payment to the respondent No.2.

20. The other objection is that the claims raised by the petitioner are barred by limitation as the work was admittedly completed on 15th November, 2016, while the present petition has been filed in November, 2019. The plea of limitation involves mix question of fact and law which cannot be determined in the present proceedings and the parties are at liberty to raise this objection during the arbitration.

21. In view of the above discussion, the petition is allowed.

22. Accordingly, Justice (Retd.) Reva Khetarpal (Mobile No. 9871300030), a former Judge of this Court is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

23. 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 A&C Act, 1996.

24. The parties are at liberty to approach the learned Arbitrator for further proceedings.

25. It is clarified that all rights and contentions of the parties are reserved.

26. The petition is disposed of in the aforesaid terms. All pending applications, if any, also stand disposed of.

NEENA BANSAL KRISHNA, J

MAY 27, 2022

S.Sharma



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