

23rd August, 2023
Ct. 1
D/L 1
(sg)

**CIRCUIT BENCH OF CALCUTTA HIGH COURT
AT JALPAIGURI**

C.O. 77 of 2023

M/s. Divya Shakti Construction Jagabandhu
Ghosh JV and Anr.
Versus
Superintending Engineer And Ors.

Mr. Rohit Banerjee
Mr. Hillol Saha Poddar
Mr. Deeptangshu Kar
... for the petitioners.
Mr. Joyjit Choudhury, Ld. A.A.G.,
Mr. Subir Kr. Saha, Ld. A.G.P.
Mr. Momenur Rahman
... for the State.
Mr. Ajoy Kr. Singhania
Mr. Sourab Kar
.....for the respondent no.4

This is an application for appointment of Arbitrator
under Section 11 of The Arbitration and Conciliation Act,
1996.

There is no doubt of the existence of a dispute between
the parties. The dispute relates to a contract awarded by the
State to the petitioners for strengthening part of the NH 10
leading to Darjeeling. The petitioners allegedly could not
complete the project within the agreed timeframe and the
respondents refused extension of time to the petitioners for

completing the work. The respondents finally terminated the contract on 25th April, 2022. The petitioners replied to the termination by bringing on record the monetary loss suffered by the petitioners. The petitioners also invoked the arbitration clause in the contract by issuing a notice under Section 21 of the Act on 4th April, 2023. The respondents replied to this notice on 18th May, 2023 alleging that the petitioners have not acted in terms of the dispute resolution clause under the General Conditions of Contract (GCC).

Learned counsel appearing for the petitioners places the relevant clauses and argues that the Special Conditions of Contract (SCC) would have precedence over the GCC and further that since the petitioners have admittedly not taken any steps within the first 14 days period under the relevant clause of the GCC, that time is already over. Counsel places the relevant part of the respondents' reply to the notice issued under Section 21 of the Act.

The Learned A.A.G. appearing for the respondents submits that the application is premature since the petitioners have not approached the designated body under the "Disputes" clause of the GCC. Counsel submits that the petitioners may be directed to approach this forum and file an

application only after exhausting the mechanism provided under the relevant clause of the GCC.

Clause 24 of the GCC refers to “Disputes” and clause 24.1 provides for any decision taken by the Engineer of the respondents to be referred to the “Dispute Review Expert” within 14 days of the notification of the Engineer’s decision if the contractor believes the decision to have been wrongly taken. Clause 25 sets out the procedure for disputes under which 25.1 requires the Dispute Review Expert (Board) to give a decision in writing within 28 days of receipt of a notification of a dispute. Clause 25.2 provides, *inter alia*, that either party may give notice to the other to refer a decision of the Dispute Review Expert to an Arbitrator within 28 days of the Dispute Review Expert’s written decision and if neither party do so, the Expert’s decision will be final and binding on the parties.

Although, the clauses stated above provided for 14 days for the decision to be referred to the Dispute Review Expert and thereafter 28 days for the decision of the Expert Board and thereafter a further 28 days of the decision of the Expert to be referred to an Arbitrator, all the clauses flow into Clause 25.3 which specifically provides that the arbitration shall be

conducted in accordance with the arbitration procedure stated in the Special Conditions of Contract.

The Special Conditions of Contract are part of records with an arbitration clause under Clause 3 of the SCC. Clause 25.3(a) of the SCC is evidently in continuation of Clause 25.3 of the GCC and provides for the mechanism for settlement of disputes through an Arbitrator/ Arbitral Tribunal in accordance with the procedure of the 1996 Act.

The contention on behalf of the petitioners that the SCC does not provide for any 14 days period or otherwise or for exhaustion of the mechanism under the GCC is misconceived since Clause 25.3 of the SCC is clearly in continuation of Clause 25.3 of the GCC and starts from a stage subsequent to Clause 25.3 of the GCC.

Hence, the question of whether there should be a single Arbitrator or a Tribunal of three Arbitrators can only be decided after the parties exhaust their remedies under Clause 25 of the GCC. The petitioners have evidently not taken any steps under Clause 24 or 25 of the GCC and has come to the Court for appointment of an Arbitrator. The defence of the 14 days timeframe period having expired and the petitioners being without a remedy cannot be seen as a credible defence

since the apprehension of the expert body consisting of the respondents' men/ officials is clearly an afterthought. The petitioners were put to notice of the respondents' stand as far back as on 18th May, 2023.

The petitioners, however, cannot be without a remedy, hence the Court is of the view that the petitioners shall be given 14 days from tomorrow, i.e., 24th August, 2023 to exhaust the mechanism provided in Clause 24 and 25 of the GCC. The petitioners must run the course of the mechanism provided under the GCC before the petitioners can come to the Court for appointment of an Arbitrator since that stage is provided for under the SCC and will become relevant only after the GCC conditions have been complied with.

The Court had called for a report from the learned Registrar, IT, Principal Bench as to the nomenclature of the present application, which should have been an Arbitration Petition. The report states that the Circuit Bench of Jalpaiguri does not have the required mechanism to use 'AP' since matters in the Original Side are usually not filed in the Circuit Bench at Jalpaiguri. The Court thereafter was informed that the matter may be heard and disposed of in the present form/ nomenclature.

CO/77/2023 is accordingly disposed of in terms of the above.

(MOUSHUMI BHATTACHARYA, J.)