

AP/10/2023
IN THE HIGH COURT AT CALCUTTA
ORDINARY ORIGINAL CIVIL JURISDICTION

GPT INFRAPROJECTS LIMITED
VERSUS
DAMODAR VALLEY CORPORATION

BEFORE:
THE HON'BLE CHIEF JUSTICE PRAKASH SHRIVASTAVA
DATE : 9TH FEBRUARY, 2023

APPEARANCE:
Mr. Zeeshan Haque, Advocate
....for the petitioner
Mr. Pradip Tarafder, Advocate
Mr. Subir Pal, Advocate
....for the respondent

The Court:- This application under Section 11 of the Arbitration and Conciliation Act, 1996 has been filed for appointment of arbitrator to resolve the dispute between the parties.

The case of the applicant is that the item rate contract/works contract was awarded to the applicant by the respondent on 1.6.2013. Thereafter, the dispute had arisen. Therefore, in terms of arbitration clause, initially notice dated 14th June, 2022 under Section 21 of the Arbitration and Conciliation Act, 1996 was served upon the respondent. Thereafter, the matter was taken up in adjudication by the adjudicator but the adjudicator had closed the proceeding on 10th October, 2022. Thereafter, the notice dated 21.10.2022 again proposing the arbitrator was sent. The said notice was received but not replied by the respondent. Hence, this application has been filed.

Learned counsel for the respondent has raised the objection that in terms of clause 48.1.3, the second adjudicator was required to be appointed to adjudicate the dispute, therefore, the applicant is not justified in straightway invoking the arbitration clause.

Submission of learned counsel for the applicant is that the conditions mentioned in clause 48.1.3 are not satisfied, therefore, it is not the case where second adjudicator was required to be appointed.

I have heard learned counsel for the parties and perused the records.

The following adjudication and arbitration clauses not are in dispute:

48.1 ADJUDICATOR

48.1.1 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 Facilities-whether during the progress of the Facilities 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 shall be referred in writing by either party to the Adjudicator, with a copy to the other party.

“ 48.1.2 The Adjudicator shall give its decision in writing to both parties within twenty-eight (28) days of a dispute being referred to it. If the Adjudicator has done so, and no notice of intention to commence arbitration has been given by either the Employer or the Contractor within fifty-six (56) days of such reference, the decision shall become final and binding upon the Employer and the Contractor. Any decision that has become final and binding shall be implemented by the parties forthwith.

48.1.3 Should the Adjudicator resign or die, or should the Employer and the Contractor agree that the Adjudicator is not fulfilling its functions in accordance with the provisions of the Contract, another retired Judge of High Court / Supreme Court of India shall be jointly appointed by the Employer and the Contractor as Adjudicator under the Contract. Failing agreement between the two, within twenty eight (28) days, the new retired Judge of High Court/Supreme Court of India shall be appointed as Adjudicator under the Contract at the request of either party by the Appointing Authority specified in the SCC. The Adjudicator shall be paid fee plus reasonable expenditures incurred in the execution of its duties as Adjudicator under the Contract. These costs shall be divided equally between the Employer and the Contractor.

48.2 ARBITRATION

48.2.1 If either the Employer or the Contractor is dissatisfied with the Adjudicator's decision, or if the Adjudicator fails to give a decision within twenty-eight(28) days of a dispute being referred to it, then either the Employer or the Contractor may, within fifty-six(56) days of such reference, give notice to the other party, with a copy for information to the Adjudicator, of its intention to commence arbitration, as hereinafter provided, as to the matter in dispute, and no arbitration in respect of this matter may be commenced unless such notice is given.

48.2.2 Any dispute in respect of which a notice of intention to commence arbitration has been given in accordance with GCC Sub-Clause 48.2.1, shall be finally settled by arbitration. Arbitration may be commenced prior to or after completion of the Facilities.

48.2.3 Any dispute submitted by a party to arbitration shall be heard by an arbitration panel composed of three arbitrators, in accordance with the provisions set forth below.

48.2.4 The Employer and the Contractor shall each appoint one arbitrator, and these two arbitrators shall jointly appoint a third arbitrator, who shall chair the arbitration panel. If the two arbitrators do not succeed in appointing a third arbitrator within twenty-eight(28) days after the latter of the two arbitrators has been appointed, the third arbitrator shall, at the request of either party, be appointed by the Appointing Authority for arbitrator designated in the SCC.

48.2.5 If one party fails to appoint its arbitrator within forty-two (42) days after the other party has named its arbitrator, the party which has named an arbitrator may request the Appointing Authority to appoint the second arbitrator.”

The record reflects that after service of notice dated 14th June, 2022, the adjudication proceeding before the adjudicator in terms of clause 48.1.2 had started. It is also not in dispute that prior to invoking clause 48.1.2, there was an attempt for settling the dispute through mutual consultation in terms of clause 48.1. The adjudicator had closed the proceeding on 10th October, 2022 on the ground that 28 days' period for completion of the proceeding in terms of clause 48.1.2 had expired. Thereafter, there was a request by the applicant for appointment of the arbitrator in terms of the arbitration clause. So far as the objection of learned counsel for the respondent that the second adjudicator was required to be appointed in terms of clause 48.1.3, is concerned, the said clause can be invoked in case first adjudicator resigns or dies or the employer and contractor agree that the adjudicator is not fulfilling its function in accordance with the contract. The closer proceeding dated 10th October, 2022 does not indicate that the first adjudicator had resigned. There is also no material on record to show that the employer and the contractor had agreed for appointment of the second adjudicator on the ground that the first adjudicator had not fulfilled its function in accordance with the provisions. Hence, in the facts of this case, the circumstances for appointment of second adjudicator in terms of clause 48.1.3 are not existing. Hence the objection raised by the respondent cannot be sustained.

Since the arbitration agreement exists between the parties and the applicant has complied with all the requisite conditions before invoking the arbitration clause and the dispute also exist between the parties, I am of the opinion that a case for allowing the prayer for appointment of the sole arbitrator is made out. Accordingly, AP is allowed. Justice Deepak Verma (9717393521), retired Judge of the Supreme Court is appointed as Arbitrator to resolve the disputes between the parties, subject to submission of declaration by the Arbitrator in terms of Section 12(1) in the form prescribed in the Sixth Schedule of the Act before the Registrar, Original Side of this Court, within four weeks from today.

Let this order be conveyed to the Arbitrator by the Registrar,
Original Side, forthwith.

(PRAKASH SHRIVASTAVA, C.J.)

akg/