

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

ARBITRATION PETITION NO.217 OF 2022

Shubham EPC Private Limited ... Petitioner
Vs.
Office of Development Commissioner (MSME)
Ministry of Micro, Small & Medium Enterprise
and another ... Respondents

Mr. Pritesh Burad a/w. Ms. Samita Vaviya and Ms. Twinkle Gadhiya i/b. Pritesh Burad Associates for Petitioner.

Mr. Abhishek Bhadang a/w. Ms. Tanu Khattri for Respondents.

CORAM : MANISH PITALE, J.

DATE : APRIL 10, 2023

P.C. :

. Heard learned counsel for the parties.

2. The petitioner has filed the present petition under Section 11 of the Arbitration and Conciliation Act, 1996 (said Act), seeking appointment of a sole arbitrator for resolution of disputes between the parties.

3. Mr. Burad, learned counsel appearing for the petitioner has relied upon terms of contract dated 03.01.2017, whereby the petitioner was engaged for construction of Technology Centre at Bhiwadi, Rajasthan. The contract specified that the procedure for resolution of disputes would be through arbitration and that the procedure of arbitration shall be governed by particular conditions of contract. The relevant condition of contract pertaining to procedure for arbitration was also brought to the notice of this Court.

4. Thereupon, it was submitted that on 13.06.2022, the petitioner invoked the said procedure for appointment of an arbitral tribunal, as the clause provided for nominee arbitrators to be appointed by the rival

parties and the two arbitrators to appoint the third arbitrator. The respondents positively responded to the invocation of the arbitration procedure.

5. But, thereafter, on 30.08.2022, the petitioner caused another notice to be sent to the respondents, again invoking the arbitration clause and submitted that instead of tribunal of three members, a sole arbitrator ought to be appointed for resolution of disputes between the parties, particularly because engaging three arbitrators would be a costly affair in the backdrop of the claim amount, which was approximately Rs.2.5 crores. In this notice, for the first time, the petitioner sought to invoke provisions of Micro, Small and Medium Enterprises Development Act, 2006 (MSME Act) to insist upon the seat of arbitration. There was no response on the part of the respondents to the said subsequent notice issued by the petitioner.

6. This Court issued notice in the present petition and the respondents have appeared through counsel.

7. The learned counsel appearing for the petitioner submitted that considering the quantum of claim of the petitioner, it would be in the interest of justice that a sole arbitrator is appointed and directions are given for conducting the arbitration proceedings at Mumbai. It was indicated that although the petitioner was entitled to invoke the provisions of the MSME Act since the petitioner was raising claims under the heads of 'damages' and 'interest on delayed payments', it was invoking the arbitration clause contained in the particular conditions of contract. It was further submitted that this Court may consider appointing a sole arbitrator for the arbitration proceedings to take place at Mumbai because the reference to arbitration proceedings taking place at Delhi only indicates that the venue could be Delhi.

8. On the other hand, Mr. Bhadang, learned counsel appearing for the respondents submitted that since the relevant clause under the particular conditions of contract governing the procedure for arbitration specifies that the arbitration proceedings shall be held at Delhi, the seat / place of arbitration is Delhi, indicating that the arbitration petition filed under Section 11 of the said Act is not maintainable. It is further submitted that the respondents have positively responded to the notice dated 13.06.2022 issued by the petitioner invoking the arbitration clause as per the particular conditions of contract and this was evident from e-mail dated 30.08.2022, which called upon the petitioner to intimate details of its arbitrator for further action to be taken in that regard. On this basis, it was submitted that when the agreed procedure for arbitration had not failed, there was no cause of action for the petitioner to have issued the subsequent notice dated 30.08.2022, again invoking Section 11 of the said Act.

9. This Court has considered the rival submissions in the backdrop of the material placed on record. The particular conditions of contract governing the contract of construction awarded to the petitioner shows that it indeed provides for a tribunal of three arbitrators consisting of one nominee arbitrator of each party and two arbitrators so appointed, appointing the third presiding arbitrator. It is significant that sub-clause (d) of the arbitration clause of the particular conditions of contract reads as follows:-

“(d) Arbitration proceedings shall be held at Delhi, India, and the language of the arbitration proceedings and that of all documents and communications between the parties shall be English.”

10. This Court is of the opinion that the above-mentioned sub-clause makes it abundantly clear that the place of arbitration shall be Delhi. The learned counsel for the respondents is justified in relying upon

judgement of the Supreme Court in the case of *BGS SGS SOMA JV Vs. NHPC Limited* reported in **(2020) 4 SCC 234**, wherein the Supreme Court has clearly held that in such circumstances, where the clause provides that the arbitration proceedings 'shall be held at a particular place', it has to be concluded that the place of arbitration is the one that is so specified. Applying the said position of law, it becomes clear that, in the present case, the agreed place of arbitration between the parties was Delhi.

11. In such circumstances, even if the petitioner claims that there are circumstances warranting invocation of Section 11 of the said Act for appointment of arbitrator, an application / petition in that regard ought to be filed before the competent court concerning the agreed place of arbitration. Therefore, the present petition filed before this Court is held to be not maintainable.

12. In the light of the above, this Court is not commenting upon the act of the petitioner in issuing the second notice dated 30.08.2022, invoking arbitration despite the fact that in response to the earlier notice dated 13.06.2022 sent by the petitioner, the respondent by email dated 30.08.2022 had responded positively, thereby indicating that the agreed procedure for appointment of arbitrator could not be said to have failed. It would not be appropriate for this Court to comment upon the same, once it is held that the present petition filed under Section 11 of the said Act is not maintainable.

13. In view of the above, the petition is dismissed as not maintainable before this Court.

14. Needless to say that the petitioner is at liberty to approach the appropriate Court for relief.

(MANISH PITALE, J.)