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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 07.02.2023

+ ARB.P. 26/2023

M/S KBG ENGINEERS Petitioner

Through: Mr. Avinash Trivedi, Advocate.

versus

DELHI STATE INDUSTRIAL AND INFRASTRUCTURE
DEVELOPMENT CORPORATION LTD Respondents

Through: Mr. Sonal Anand and Ms.
Surbhi Singh, Advocates.

CORAM:

HON'BLE MR. JUSTICE PRATEEK JALAN

PRATEEK JALAN, J. (ORAL)

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1. The petitioner has approached this Court under Section 11 of the Arbitration and Conciliation Act, 1996 [“the Act”], for appointment of an arbitrator to adjudicate disputes between the parties under a contract for construction of roads and SW drains at Qutub Vihar, Phase-1, Najafgarh, Matiala. The contract was awarded to it by the respondent-Delhi State Industrial and Infrastructure Development Corporation Limited [“DSI IDC”] vide letter of acceptance dated 14.02.2012, pursuant to a tender issued by the respondent.

2. Notice of this petition was issued on 11.01.2023, and the respondent was granted time to file a reply. Although DSI IDC's reply

has not come on record, a copy has been handed up in Court and is taken on record.

3. The contract incorporates Clause 25 of the General Conditions of Contract [“GCC”], which provides for settlement of disputes and arbitration. The relevant parts of the said clause are reproduced below:-

“Settlement of Disputes & Arbitration

Except where otherwise provided in the Contract all questions and disputes relating to the meaning of the specifications, design, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used on the work or as to any other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the Contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:

3) If the Contractor considers any work demanded of him to be outside the requirements of the Contract, or disputes and drawings, record or decision given in writing by the Engineer on any matter in connection with or arising out of the Contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the superintending engineer shall give his written instructions or decision within a period of one month from the receipt of the Contractor’s letter.

*If the superintending engineer fails to give his instructions or decision in writing within the aforesaid period or if the Contractor is dissatisfied with the instructions or decision of the superintending engineer, the Contractor may, within 15 days of the receipt of the superintending engineer decision, appeal to the chief engineer who shall afford an opportunity to the Contractor to be heard, if the latter so desires, and to offer evidence in support of his appeal. The Chief Engineer shall give his decision within 30 days of receipt of contractor’s appeal. If the Contractor is dissatisfied with this decision of the Chief Engineer, **the contractor may within 30 days from the receipt of the Chief Engineer decision, appeal before the***

Dispute Redressal Committee (DRC) along with a list of disputes with amounts claimed in respect of each such dispute and giving reference to the rejection of his disputes by the Chief Engineer. The Dispute Redressal Committee (DRC) shall give his decision within a period of 90 days from the receipt of Contractor's appeal. The constitution of Dispute Redressal Committee (DRC) shall be as indicated in Schedule 'F' \ If the Dispute Redressal Committee (DRC) fails to give his decision within the aforesaid period or any party is dissatisfied with the decision of Dispute Redressal Committee (DRC), then either party may within a period of 30 days from the receipt of the decision of Dispute Redressal Committee (DRC), give notice to the Chief Engineer for appointment of arbitrator on prescribed proforma as per appendix XV, failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.

It is the term of contract that each party invoking arbitration must exhaust the aforesaid mechanism of settlement of claims/disputes prior to invoking arbitration.

4) Except where the decision has become final, binding and conclusive in terms of Sub Para (1) above, disputes or difference shall be referred for adjudication through arbitrator by a sole arbitrator appointed by the chief engineer, CPWD, in charge of the work there be no chief engineer, the additional director general, the director general of the concerned regional work CPWD or if there be no additional director general, the director of general of work, CPWD, if the arbitrator so appointed is unable or unwilling to act or resigns his appointment vacates his office due to any reason whatsoever, another sole arbitrator shall be appoint in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is a term of this Contract that the party invoking arbitration shall give a list of disputes with amount claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the chief engineer of the appeal.

It is also a term of this Contract that no person other than a person appointed by such Accepting Authority as aforesaid should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

It is also a term of this Contract that if the Contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from

the Engineer-in-Charge that the final bill is ready for payment, the claim of the Contractor shall be deemed to have been waived and absolutely barred and the Employer shall be discharged and released of all liabilities under the Contract in respect of these claims....”¹

4. The petitioner claims that the payments due to it under the contract were not paid by the respondent. There was considerable correspondence between the parties with regard to the petitioner’s claims, including the following:-

- a. The petitioner addressed a letter dated 01.01.2020 to the respondent, requesting it to “*act in terms of clause 25 of an agreement*”² and to release the payments claimed by it.
- b. By a further letter dated 07.06.2020, the petitioner asserted that it had invoked the arbitration clause and requested the respondent to appoint an arbitrator in terms of the arbitration agreement within 30 days.
- c. The petitioner sent a letter dated 07.08.2020 stating that it had invoked the arbitration clause and also approached the office of the Chief Engineer. It reiterated its request to the respondent to appoint an arbitrator.
- d. The respondent, vide letter dated 26.02.2021, notified that the petitioner had not submitted the final bill and the account of work had not been finally closed. The petitioner was, therefore, directed to submit the final bill within 15 days.

¹ Emphasis in original.

² Document-7 of petitioner’s list of documents.

- e. Although the petitioner disputed the respondent's assertion, it addressed a letter dated 10.08.2021 to the respondent, noting that it had approached the Superintending Engineer and the Chief Engineer for resolution of disputes, but to no avail. In this communication, the petitioner suggested dispensing with the Dispute Redressal Committee ["DRC"] and proposed names of five persons for appointment as the arbitrators. It also enclosed the required *pro forma* for this purpose.
- f. The petitioner addressed a further communication dated 25.10.2021 to the respondent, making a grievance that its letter dated 10.08.2021 had not elicited a response. It was further requested that the appointment of an arbitrator may be accepted. However, the petitioner also conceded that "*in case department think DRC can resolve our disputes then the same may be constituted under clause-25 at the earliest*".³
- g. Alongwith the reply, DSIIDC has relied upon a communication dated 17.03.2022, by which the respondent replied to the aforesaid letter dated 25.10.2021. In the said letter, several short-comings on part of the petitioner have been alleged, but there is no suggestion that the DRC is being constituted.
- h. Several further letters have also been placed on record by learned counsel for the parties, including the petitioner's reminders for appointment of an arbitrator and the respondent's

³ Document-13 of petitioner's list of documents.

communications with regard to the petitioner's claims and required documentation.

5. I have heard Mr. Avinash Trivedi, learned counsel for the petitioner, and Mr. Sonal Anand, learned counsel for respondent.

6. Mr. Anand principally raises two objections to the appointment of an arbitrator. His first submission is that the claims sought to be raised by the petitioner are barred by limitation. The second ground is that the petitioner has not exhausted the procedure of Clause 25 of the GCC. Mr. Anand submits that respondent is even now ready to constitute a DRC.

7. As far as the issue of limitation is concerned, I am of the view that in the facts and circumstances, it is appropriate to leave the issue for consideration by the arbitrator. Although the judgments of the Supreme Court *inter alia* in *BSNL and Anr. vs. Nortel Networks India Pvt. Ltd.*⁴, make it clear that the Court may decline a reference to arbitration in case the claims are *ex facie* time barred, such a course is to be adopted only in a very limited category of cases "*where there is not even vestige of doubt that the claim is ex facie time barred*".⁵

8. Mr. Anand submits that in the present case, the petitioner's cause of action, even according to the averments made in the petition itself, arose in the year 2015 whereas the arbitration clause was first invoked on 01.01.2020. Mr. Trivedi, on the other hand, points out that there are several acknowledgements and part-payments by the

⁴ (2021) 5 SCC 738.

⁵ Paragraph 47.

respondent, which according to him, serve to give rise to fresh periods of limitation under Sections 18 and 19 of the Limitation Act, 1963.

9. Having regard to the clear mandate of the Supreme Court that, in proceedings under Section 11 of the Act, the Court is to be guided by the principle, “*when in doubt, do refer*”,⁶ I am of the view that proper course in the present case is to reserve the question of limitation for a decision by the arbitrator.

10. As far as the second ground, with regard to compliance with the procedure for DRC under Clause 25 is concerned, suffice it to say that the petitioner expressly sought reference to the DRC in its communication dated 25.10.2021, which was not addressed at all in the respondent’s reply dated 17.03.2022. Clause 25 itself provides a period of 90 days from the receipt of the contractor’s appeal for the DRC to make its decision, failing which any party is entitled to approach the arbitrator. While this position has already been triggered in the present case, Mr. Trivedi submits that the petitioner is agreeable to an attempt at resolution of disputes by the DRC within a period of 90 days from today, failing which the disputes may be resolved through arbitration.

11. Having regard to the aforesaid, the petition is disposed of with the following directions:-

- a. The respondent will constitute a DRC and inform the petitioner as well as Mr. Trivedi of the constitution of the DRC so that the

⁶ *Vidya Drolia v. Durga Trading Corpn.*, (2021) 2 SCC 1, paragraph 238.

petitioner may submit its representation within one week thereafter.

- b. The DRC will dispose of the matter within a period of 90 days from today. In the event the DRC does not give a decision within 90 days, or either party is dissatisfied with the decision of the DRC, disputes under the contract will be referred to the arbitration of Ms. Padma Priya, Advocate [Tel:- 9910531145].
- c. Either party may approach the learned arbitrator after 90 days from today, with a request to enter into the reference forthwith.
- d. The learned arbitrator is requested to furnish a declaration under Section 12 of the Act, prior to entering upon the reference.
- e. The remuneration of the learned arbitrator will be computed in accordance with the Fourth Schedule to the Act.

12. It is made clear that all rights and contentions of the parties, including on limitation, are left open for adjudication before the learned arbitrator.

13. The petition is disposed of in terms of the aforesaid directions.

PRATEEK JALAN, J

February 07, 2023/‘vp’/