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

Judgment pronounced on: 01.12.2023

+ **ARB. P. 142/2023**

M/s AJAY M/C TOOLS

..... Petitioner

Through: Mr. Sanjoy Bhaumik, Adv

versus

PUBLIC WORKS DEPARTMENT

GOVT OF NCT DELHI

..... Respondent

Through: Mr. Rajesh Kumar Agnihotri, Adv.

CORAM:

HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

1. The present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996, seeks appointment of a Sole Arbitrator for the adjudication of disputes between the parties.
2. Respective counsel for the parties are in agreement that the contract agreement in the present case is exempted from being charged with stamp duty in view of proviso (1) to Section 3 of the Indian Stamp Act, 1899 and there is no controversy on that count.

FACTUAL MATRIX

3. The disputes between the parties have arisen in context of a tender process initiated by the respondent for the work of “*comprehensive development of corridor (outer ring road) between Mukarba Chowk and Wazirabad Chowk (SH: providing energy efficient street light fittings and*



16 m high masts.)”. The said work was awarded to the petitioner and an Agreement No. 02/EE(E)/PWD/FPED/F-13/2016-17, was executed between the parties.

4. As per the aforesaid Agreement the work was to be completed by 04.05.2017. The petitioner claims that due to various delays and defaults not attributable to the petitioner, the work was completed on 25.10.2019. Various disputes have arisen between the parties due to the delay in completion of the work and payments due to the petitioner for work done under the aforesaid Agreement.

5. Clause 25 of the applicable General Conditions of Contract (“GCC”) contains the dispute resolution mechanism and is in the following terms:

“Clause 25 - 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 here-in 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:

(i) If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the Engineer-in-Charge 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 in writing for written instruction or decision. Thereupon, the Superintending Engineer shall give his written instructions or decision within a period of one month from the receipt of the contractors' 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 decision, the contractor may, within 15 days of the receipt of Superintending Engineer's 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 the 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 a term of contract that each party invoking arbitration must exhaust the aforesaid mechanism of settlement of claims/disputes prior to invoking arbitration.

(ii) Except where the decision has become final, binding and conclusive in terms of sub-para (i) above, disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Chief Engineer, CPWD, in charge of the work or if there be no Chief Engineer, the Additional Director General of the concerned region of CPWD or if there be no Additional Director General, the Special Director General or the Director General, CPWD. 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 his 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 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 Chief Engineer CPWD or Additional Director General or Special Director General or Director General, CPWD, 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 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 Government shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitration shall be conducted in accordance with the provisions of the Arbitration & Conciliation Act 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

It is also a term of this contract that the arbitrator shall adjudicated on only such disputes as are referred to him by the appointing authority and give separate award again each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs. 1,00,000/-, the arbitrator shall give reasons for the award.

It is also a term of the contract that if any fees are payable to the arbitrator, these shall be paid equally by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid."

6. In terms of the aforesaid Clause 25, the petitioner vide letter dated 16.09.2022 first raised its claims/disputes before the 'Executive Engineer'. However, there was no response to the said letter by the 'Executive Engineer'. Thereafter, the petitioner vide letter dated 03.10.2022 raised its



claims/disputes before the ‘Chief Project Manager’ (there was no post of Superintending Engineer, as envisaged in the aforesaid Agreement), however, there was again no response. The petitioner vide another letter dated 28.10.2022, addressed to the ‘Chief Engineer’ and to the ‘Chairman-Chief Project Manager’, sought constitution of a Dispute Redressal Committee (“DRC”); however, no DRC was formed pursuant thereto. The petitioner then addressed another letter dated 15.11.2022 to the ‘Chief Engineer’ invoking the arbitration clause and highlighting the fact that the petitioner will be approaching this court for constituting an Arbitral Tribunal, since it is impermissible for any one of the parties to appoint an arbitrator.

7. Subsequently, the ‘Chief Engineer’ of the respondent vide letter dated 17.11.2022 addressed to the ‘Executive Engineer’, with a copy marked to the petitioner, sought comments on the claims of the petitioner including the admissibility of the said claims. Thereafter, the petitioner vide letter dated 02.12.2022 requested the ‘Chief Engineer’ to give his decision in terms of Clause 25, in respect of the claims submitted therein. The ‘Chief Engineer’ addressed a letter dated 19.12.2022 to the ‘Executive Engineer’ highlighting the lapse on the part of the ‘Executive Engineer’ to act in terms of the previous letter dated 17.11.2022 and requested the ‘Executive Engineer’ to look into the disputes/claims raised by the petitioner urgently.

8. The respondent/Chief Engineer, vide letter dated 21.12.2022 informed the petitioner that the DRC had been constituted. The petitioner in response thereto, vide letter dated 23.12.2022, stated that in the absence of any decision of the ‘Chief Engineer’, it was not possible for the petitioner to file any appeal (as contemplated under Clause 25) before the DRC. The



petitioner also highlighted the fact that the DRC constituted by the respondent was completely different from the DRC mentioned in Schedule F of the agreement. However, the petitioner agreed to present itself before the DRC and stated that the said letter be also treated as invocation of arbitration. Thereafter, vide letter dated 02.01.2023, the respondent fixed 20.01.2023 as the date for the DRC meeting.

9. As per the petitioner, in the DRC meeting held on 20.01.2023, the committee rejected the claims of the petitioner and conveyed to the petitioner to proceed with Arbitration. Accordingly, the petitioner vide letter dated 23.01.2023, once again invoked the arbitration clause and stated that the petitioner will be proceeding to the Court for appointment of an Arbitrator. The said letter dated 23.01.2023 has been reproduced as under :-

“Dear Sir

Kindly refer to our meeting Dated 20.01.2023 held in the chamber of Chief Engineer (South) M with regard to Dispute Redressal Committee (DRC). We had tabled our claims to the committee but we were informed by the committee that the claims cannot be granted and there after informed us to proceed for Arbitration. In view of the aforementioned facts we have exhausted all the procedure incorporated in clause 25 of General Conditions of contracts (GCC). We are now left with no option but to seek the appointment of the arbitrator from the Hon’ble high court of Delhi we once again hereby invoke clause 25 being the arbitration clause and proceed to court for the appointment.”

SUBMISSIONS OF THE PARTIES

10. Learned counsel for the respondent has raised a two fold objection to the present petition. Firstly, it is contended that the claims raised by the petitioner are barred by limitation. It is submitted that the work was completed on 25.10.2019 and the petitioner invoked the Clause 25/arbitration clause vide letter dated 23.12.2022 i.e. more than three years after completion of work. Secondly, it is contended that the petitioner has



not invoked arbitration as per Clause 25 (supra). It is contended that the petitioner submitted its appeal before the DRC on 20.01.2023 and as per Clause 25, the DRC was required to render its decision within 90 days from the receipt of the petitioner's/contractor's appeal; the decision of DRC was issued vide letter dated 22.02.2023; however, the petitioner without waiting for the decision of DRC invoked the arbitration clause, which is impermissible.

11. *Per contra*, learned counsel for the petitioner submits that the petitioner raised its claims before the respondent on 16.09.2022 i.e. within three years from date of completion of the project i.e. 25.10.2019, and exhausted the pre-arbitral steps till invocation on 23.12.2022. It is further submitted that in terms of orders passed by the Supreme Court in *Suo Motu Writ Petition (C) No. 3/2020*, the period of limitation was suspended/excluded from 15.03.2020 to 28.02.2022, and as such the claims raised by the petitioner are within limitation. It is further submitted that the arbitration clause has been invoked by the petitioner as per Clause 25. It is submitted that the petitioner vide letter dated 28.10.2022 requested the respondent for formation of the DRC; however the decision of the DRC is dated 22.02.2023 i.e. beyond the 90 days period as stipulated in the Clause 25. Therefore, there is no infirmity in invoking the arbitration clause.

ANALYSIS AND FINDINGS

12. Having perused the record and having heard learned counsel for the parties, no merit is found in the objections raised by learned counsel for the respondent.

13. Limitation is normally a mixed question of fact and law and unless the claims are *ex facie* time-barred, the rule is to refer disputes to a duly



constituted Arbitral Tribunal, which is the preferred first authority chosen by the parties. In ***BSNL v. Nortel Networks (India) (P) Ltd.***, (2021) 5 SCC 738, it has been observed by the Supreme Court as under:

“38. Limitation is normally a mixed question of fact and law, and would lie within the domain of the Arbitral Tribunal. There is, however, a distinction between jurisdictional and admissibility issues. An issue of “jurisdiction” pertains to the power and authority of the arbitrators to hear and decide a case. Jurisdictional issues include objections to the competence of the arbitrator or tribunal to hear a dispute, such as lack of consent, or a dispute falling outside the scope of the arbitration agreement. Issues with respect to the existence, scope and validity of the arbitration agreement are invariably regarded as jurisdictional issues, since these issues pertain to the jurisdiction of the tribunal.

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53.2. In rare and exceptional cases, where the claims are ex facie time-barred, and it is manifest that there is no subsisting dispute, the Court may refuse to make the reference.”

14. In the present case, admittedly, the work in question was completed by the petitioner on 25.10.2019; the petitioner invoked Clause 25 and raised disputes before the ‘Executive Engineer’ on 16.09.2022 i.e. within a period of three years from the date of completion of work. Further, in the reply filed on behalf of the respondent it was averred that it was only vide letter dated 20.12.2022 (the said letter has not been placed on record by the parties) that the petitioner was informed by the respondent that the petitioner’s claims are inadmissible. Thereafter the DRC was constituted on 21.12.2022. Further, the DRC constituted by the respondent has rejected the claims of the petitioner only on 22.02.2023 (the said letter also has not been placed on record by the parties). In the said conspectus, the claims raised by the petitioner cannot be said to be *ex facie* time-barred or deadwood; this aspect requires a detailed factual examination/adjudication, which is best left to be undertaken by the constituted Arbitral Tribunal.



15. There is also no merit in the objection raised by the respondent that the petitioner has not followed the mandate of Clause 25. The factual matrix as narrated above unequivocally shows that the petitioner has raised disputes before the ‘Executive Engineer’, ‘Chief Project Manager’ and ‘Chief Engineer’ in compliance with Clause 25. However, the said authorities have failed to render any decision.

16. Further, the purported decision/letter dated 20.12.2022 (the said letter has not been placed on record) of the respondent is only an office letter issued by the ‘Executive Engineer’ to the ‘Chief Engineer’, with a copy marked to the petitioner.

17. Since, no decision was rendered by the ‘Chief Engineer’, there was no occasion for the petitioner to file any appeal before the DRC. The same was also highlighted by the petitioner vide its invocation letter dated 23.12.2022 sent to the ‘Chief Engineer’. In ***Y.K. Goyal v. Delhi Urban Shelter Improvement Board***, 2023 SCC OnLine Del 4850, this court has held as under:

“13. It is noticed that the petitioner has sent multiple communication/s to the respondent seeking payment of its bill(s), which did not elicit any response. In the first instance, the petitioner corresponded with the concerned Executive Engineer, and having failed to receive any response, specifically took recourse to Clause 25 and sent a communication dated 13.07.2019 seeking a decision from the concerned Chief Engineer. It was incumbent on the concerned Chief Engineer to give his decision within 30 days of the receipt of the said decision. Admittedly, no decision was rendered by the Chief Engineer thereof. As such, there was no occasion to file any appeal before the Dispute Resolution Committee (DRC).”

18. However, since the DRC was in fact constituted by the respondent, the petitioner participated before the DRC on 20.01.2023. Vide letter dated 23.01.2023, the petitioner again invoked the arbitration clause since the



DRC rejected the claims of the petitioner. The formal order of the DRC was purportedly issued on 22.02.2023 (the said decision has not been placed on record), which the petitioner contends was never served on the petitioner.

19. In light of the factual chronology, as noticed hereinabove, there is no merit in the contention of the respondent that the petitioner has not adhered to the rigours of Clause 25 (supra). In any case, the decision by the DRC is stated to have been issued on 22.02.2023. As such, there is no impediment to the petitioner seeking arbitration.

Further, an independent sole arbitrator is liable to be appointed in terms of the judgment of the Supreme Court in ***Perkins Eastman Architects DPC & Anr Vs. HSCC (India) Ltd.*** (2020) 20 SCC 760.

20. Accordingly, Mr. Kirit Javali, Advocate. (Mobile No.: 9810518044) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

21. The respondent shall be entitled to raise preliminary objections as regards jurisdiction/arbitrability/limitation, which shall be decided by the learned arbitrator, in accordance with law.

22. The learned Sole Arbitrator may proceed with the arbitration proceedings subject to furnishing to the parties requisite disclosures as required under Section 12 of the A&C Act.

23. The learned Sole Arbitrator shall be entitled to fee in accordance with Fourth Schedule to the A&C Act; or as may otherwise be agreed to between the parties and the learned Sole Arbitrator.

24. The parties shall share the arbitrator's fee and arbitral costs, equally.



25. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Arbitrator on their merits, in accordance with law.

26. Needless to say, nothing in this order shall be construed as an expression of this court on the merits of the case.

27. The present petition stands disposed of in the above terms.

SACHIN DATTA, J

DECEMBER 01, 2023/hg