

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

% **Date of order : 19th April, 2023**

+ **ARB.P. 148/2023**

SWADESHI CIVIL INFRASTRUCTURE PVT LTD..... Petitioner

Through: **Mr. Dinkar Singh, Mr. Gagan Garg
and Mr. Rohit Singh, Advocates**

versus

THE ADDITIONAL DIRECTOR GENERAL REGION DELHI

CPWD Respondent

Through: **Mr. Bhagvan Swarup Shukla,
CGSC with Mr. Sarvan Kumar,
GP, Ms. Sunita Shukla and Mr.
Saksham Sethi, Advocates**

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J (Oral)

1. The instant petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter “the Arbitration Act”) has been filed on behalf of the petitioner seeking the following reliefs :-

"i. To appoint an Arbitrator in exercise of power under 11(6) of the Arbitration and Conciliation Act, 1996, to adjudicate upon and decide all the disputes between the Petitioner and the Respondent particularly in respect of issues relating to non payment of running account bills submitted by the petitioner and alleged illegal demand of recovery by the Respondent.

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ii. Pass any other or further Orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the present case."

2. The learned counsel for the petitioner submitted that the parties before this Court executed Agreement 01/EE(E)/IPBPED/2012-13 dated 7th August 2012 for construction of Indira Pariyavaran Bhavan for the Ministry of Environment and Forest at Aliganj, Jor Bagh, New Delhi. It is submitted that the general character and the scope of the work to be carried out under the Contract was to design, supply, erect, testing, commissioning of the required solar photo voltaic power plant.

3. It is submitted that the respondent vide certificate of completion dated 20th December, 2013, certified that the petitioner successfully completed the contract work. During the course of the work, the petitioner, vide letters dated 28th June 2014, 10th October 2014, 20th January 2015, 22nd December 2015, and 17th December 2016 informed the respondent about the several factors responsible for the less generation of solar power as compared to the estimated generation, and subsequently, disputes arose between the parties regarding the same.

4. It is submitted that the petitioner vide its letter dated 11th November 2016, requested the respondent not to make any recovery against the energy generation shortfall till the issue is amicably resolved. However, the respondent vide its letter dated 20th December 2016 refused to accede to the request of the petitioner.

5. The learned counsel further submitted that the petitioner furnished the first and second running accounting bills to the respondent and also

requested the respondent to resolve the issues relating to non-payment of the running accounting bills. Instead, the respondent vide its letter dated 14th December 2021 directed the petitioner to pay a sum of Rs. 3,50,20,983/- towards the recovery amount for shortfall in generation of solar power.

6. Thereafter, the petitioner vide its letter dated 26th May 2022 requested the competent authority to initiate the process of appointment of arbitration as per Clause 25 of the General Conditions of Contract (hereinafter “GCC”). However, on 24th December 2022, the respondent issued another Demand Notice towards the alleged recovery amount. Again, on 9th September 2022, the petitioner requested the DRC to expedite the resolution process and the appointment of an arbitrator. It is submitted that the Dispute Redressal Committee (hereinafter “DRC”) failed to address the pending issues between the parties relating to the non-payment of running accounting bills and the alleged recovery of amount.

7. By way of an additional affidavit, the amended GCC of 2010 have been brought on record by the petitioner. It is submitted that vide slip no. 3 of GCC 2010, the Clause 25 of the same was amended, which provides that, if the DRC fails to give its decision within the stipulated period or any party is dissatisfied with the decision of the DRC, then either party may within a period of 30 days from the receipt of the decision of DRC give notice to Chief Engineer for appointment of an arbitrator. It is also submitted that DRC even after 90 days from the filing of appeal/claim on 9th September 2022 expired on 8th December 2022.

8. Therefore, the petitioner is before this Court praying that an arbitrator may be appointed to adjudicate the disputes between the parties since the petitioner has made all efforts to settle the matter and invoke arbitration in accordance with the terms as laid down under Clause 25 of the GCC.

9. *Per Contra*, Mr. Bhagvan Swarup Shukla, the learned CGSC appearing on behalf of the respondent vehemently opposed the instant petition and submitted that averments made on behalf of the petitioner have no merits.

10. It is submitted that the petitioner has failed to follow the procedure laid down under the arbitration clause, i.e. Clause 25 of the GCC, to invoke arbitration proceedings. It is submitted that the petitioner has not exhausted the process mentioned under the arbitration/ dispute resolution clause and therefore, the instant petition is pre-mature.

11. It is submitted the petitioner is not entitled to the relief sought by it and hence, the instant petition may be dismissed.

12. Heard the learned counsel for the parties and perused the record.

13. The petitioner by way of the instant petition is seeking appointment of an arbitrator to adjudicate the disputes between the parties submitting to the effect that it has taken all steps in accordance with the terms laid down under the GCC but no action has been taken thereto, while the respondent has opposed to the appointment of an arbitrator by this Court on the ground that the pre-arbitration procedure has not been exhausted by the petitioner.

14. To adjudicate the question before this Court, it is pertinent to see the arbitration clause existing between the parties. The Clause 25 of the GCC read as under:-

“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, drawing 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 relation 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 contract 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 of carrying out the work, to be unacceptable, he shall promptly within 15 days request the Superintending Engineer in writing for within instruction or decision. Thereupon, the Superintending Engineer shall give his written instructions or decision within the period of one month from the receipt of the contractor's letter.

If the Superintending Engineer fails to give his instructions or directions 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 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 this decision, the contractor shall within a period of 30 days from receipt of the decision, 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.

(ii) Except where the decision has become final, bindings 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 Chief Engineer in the Additional Director General, the Director General of Works, 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 let by his predecessor.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claims in respect of each such dispute alongwith the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.

It is also a terms of this contract that no person, other than a person appointed by such Chief Engineer, CPWD or Additional Director General or Director General of works, 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 that it 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....”

15. The authorised person, i.e., Mr. Amit Goyal, working as Director on the Board of Directors for M/s Swadeshi Civil Infrastructure Pvt Ltd, the petitioner herein, furnished his additional affidavit stating therein that Claus 25 of the GCC 2010, stands amended by Slip No. 3 of the GCC 2010, and now reads as under:-

“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 instructions or decision. Thereupon, 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 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 claims/disputes prior to invoking arbitration.”

16. It is admitted that there are disputes between the parties which are arising out of the Contract executed between them. Hence, there is no disagreement regarding the arbitrability of the disputes arising out of the Contract. The only question which remains to be adjudicated between the parties pertains to the pre-arbitration procedure, which was stipulated under the GCC.

17. A perusal of the aforesaid amended provision shows that the requirement at the time of invoking arbitration proceedings is that of a request in writing to the Superintending Engineer. Thereafter, the time period is also given for the Superintending Engineer to give its decision and for the contesting party to appeal against the said decision to the Chief Engineer. There is a time stipulated for the Chief Engineer as well

for giving its decision to the appeal preferred by the contractor aggrieved. Thereafter, the relief also lies in favour of the contractor if aggrieved by the decision of the Chief Engineer before the Dispute Redressal Committee. If after the said procedure is followed, exhausted but the contractor is still aggrieved, the arbitration proceedings may be invoked.

18. In the instant matter, the petitioner made a representation to the Executive Engineer (E) on 23rd March 2021 and 5th May 2021 and also submitted the two running accounting bills alongwith extra item statement requesting the Superintendent Engineer (E) for payment of its pending bills. Thereafter, the petitioner also furnished a letter 2nd July 2021 alongwith a consolidated updated bill to the Executive Engineer (E) for payment of its pending bills. The affidavit on behalf of the petitioner also shows that the petitioner furnished a representation to the Superintending Engineer (E), alongwith a copy to the Executive Engineer (E), and further requested resolution of issues between the petitioner and the respondent after waiting for 13 months for the payment of the petitioner's bills.

19. It was only after the aforementioned representations and letter were written to the authorities concerned but the matter remained unresolved that the petitioner served the letter dated 27th January 2022 calling upon the respondent to refer the disputes between them to the DRC.

20. Reference has been made to the letter dated 14th June 2022 issued by the competent authority bearing Office Memorandum No. 20(3)/(DRC)/ADG(RD)/W&TLQA/1066 wherein it was stated that a Dispute Redressal Committee was constituted for resolution of pending issues amongst the parties amicably on 11th June 2022. However, the said

DRC failed to give its decision within the stipulated time period of 90 days from the date of receipt of the claim/appeal, which ended before the petitioner filed the instant petition. Moreover, the petitioner had also informed the DRC, vide its letter dated 5th January 2023 that the petitioner has initiated a request to the Additional Director General (Region Delhi), CPWD for appointment of Arbitrator as DRC failed to redress the dispute within 90 days of submission of its claim. The DRC, thereafter, passed a direction, however, the petitioner was dissatisfied of the same and hence, it acted in accordance with the procedure stipulated under the arbitration clause.

21. After the entire course of events, neither the disputes between the parties were redressed nor was an arbitrator appointed to look into the resolution of the said disputes. Hence, the petitioner approached this Court.

22. At this stage, this Court deems it pertinent to refer to the spirit of the Arbitration Act. The Arbitration Act was enacted for providing a mechanism to the public to resolve their disputes in a process less rigorous, technical and formal than that of a litigation. It has proven to be easier, more accessible, efficient and even cost effective for the parties involved, whether at an individual level or at the level of a business or corporation. The alternative dispute mechanism is not only advantageous for the people involved in disputes but has also been aiding the effective disposal and release of burden on the Courts of the Country. It has been time and again reiterated that where in terms of an Agreement or otherwise, the parties to a dispute agree to resolve them they may be

referred to arbitration where the minimum tests, including that of arbitrability of disputes, are satisfied.

23. Keeping in view the spirit and intent of the Arbitration Act, the Hon'ble Supreme Court has given its view to suggest that pre-arbitration procedures are not always mandatory. In the judgment passed in *Visa International Ltd. vs. Continental Resources (USA) Ltd.*, (2009) 2 SCC 55, the Hon'ble Supreme Court held as under:-

“Whether invocation of Article VI providing for arbitration is premature?”

38. It was contended that the pre-condition for amicable settlement of the dispute between the parties has not been exhausted and therefore the application seeking appointment of arbitrator is premature. From the correspondence exchanged between the parties at pp. 54-77 of the paper book, it is clear that there was no scope for amicable settlement, for both the parties have taken rigid stand making allegations against each other. In this regard a reference may be made to the letter dated 15-9-2006 from the respondent herein in which it is inter alia stated “... since February 2005 after the execution of the agreements, various meetings/discussions have taken place between both the parties for furtherance of the objective and purpose with which the agreement and the MoU were signed between the parties. Several correspondences have been made by CRL to VISA to help and support its endeavour for achieving the goal for which the abovementioned agreements were executed”. In the same letter it is alleged that in spite of repeated requests the petitioner has not provided any funding schedules for their portion of equity along with supporting documents to help in convincing OMC of financial capabilities of the parties and ultimately to obtain financial closure of the project. The exchange of letters between the parties undoubtedly discloses that attempts were made for an amicable settlement but without any result leaving no option but to invoke the arbitration clause.”

24. In the aforesaid judgment, the Hon'ble Supreme Court held that the where the requirement was not followed prior to the invocation of the arbitration clause, it was held that the request for arbitration was not premature, since, first, there was no scope for amicable settlement as both parties had taken a rigid stand and second, the correspondences between the parties showed that attempt were in fact made to amicably settle the disputes.

25. In the matter of ***Sikand Construction Co. vs. State Bank of India, 1978 SCC OnLine Del 180***, having similar pre-arbitration procedure as the instant case pertaining to obtaining decision of one or more persons prior to arbitration, the Coordinate Bench of this Court held as under:-

“10. There is no indication of a judicial hearing by the architects referred to in clause (37). The architects under this clause are to decide the disputes in writing but if either the employer or the contractor, i.e., the respondent bank and the petitioner respectively, is dissatisfied with the decision of the architects, either party may within 28 days after receiving the notice of decision of the architects give in writing notice to the other party through the architects requiring that much matters in dispute be arbitrated upon. It is further required by this clause that such written notice shall specify the matters in dispute. The disputes are required to be referred to a Fellow of the Indian Institute of Architects. The arbitrators have been conferred absolute power to open up, review and revise any decision of the architects and to determine all matters in dispute which may be submitted to them. Thus clause (37) confers absolute power upon the arbitrators without any restriction. The arbitrators by their decision may override any one and all the decisions of the architects. Moreover, if a matter is not placed before the architects for decision in accordance with the first para of clause (37)

consequences for not following this procedure have not been provided for either in clause (37) or in any other clause of the contract; and, as such, the first part of clause (37) of the conditions of contract is only directory and not mandatory. Even in a case where the employer i.e. the bank or the contractor i.e. the petitioner has not followed the procedure for getting the decision of the architects for any reason whatsoever, the employer or the contractor is not debarred from invoking arbitration. The employer and the contractor in all circumstances can invoke the arbitration referred to in clause (37). The intention of the parties to the contract is to get settled disputes of any nature whatsoever through the architects or the arbitrators. Clauses (35) and (37) of the conditions of contract provide the machinery for settlement of the various disputes between the employer and the contractor. Some of the disputes which come under clauses (2), (4), (8), (14), (20), (a), (b), (d), (f) and (h), (28), (32) and (38) are finally decided by the architects and are not open to review before the arbitrators but all other disputes of any nature whatsoever are subject to final decision and review of the arbitrators. If for any reason the architects do not take initiative or do not decide a matter when referred to by any of the parties or no reference is made to architects for decision, it does not mean that the arbitrators have no power to decide the dispute.”

26. It is evident that the Court was of the view that the precondition of reference to an architect and his decision was directory and not mandatory. It was found that the decision of architect was not final and subject to the right of arbitration and review and secondly, there was no indication of a judicial hearing by the arbitration. In the case at hand as well, the decision of the Superintending Engineer as well as the Chief Engineer was appealable and none of them were able to resolve the disputes between the parties.

27. Further, in the judgment of ***Build Fab vs. Airport Authority of India, 2012 SCC OnLine Cal 7189***, the contract clause required decision by Dispute Resolution Board upon a request being made within ninety days of dispute arising, and only the matters which are not resolved before Dispute Resolution Board could be referred to arbitration. This requirement was not complied with. It was held that since the matter was not referred to Dispute Resolution Board, arbitration clause could not have been invoked.

28. Therefore, it is evident, that the Courts have held that the pre-arbitration procedures are not always mandatory in nature. In the instant case, there is a Contract in existence which has given rise to the contractual relationship between the parties and which has also given rise to the disputes between them. There is no challenge to the fact that the disputes are arbitrable in nature. Moreover, there is an arbitration clause in the Contract between the parties which entitles them to invoke arbitration and the petitioner has made several attempts, with not only the respondent but also with all concerned authorities and offices, to have the disputes between the parties resolved amicably. The petitioner had also sent several notices and communications to the concerned authorities. Hence, the basic tenets of the Arbitration Act are not standing in way of the appointment of an arbitrator for adjudication of the disputes between the parties. It is also found that the disputes between the parties may be considered, adjudicated upon and be finally resolved by reference to an arbitrator. Hence, at this stage with the requisites being fulfilled, this Court is inclined to refer the disputes between the parties to an independent sole arbitrator.

29. Therefore, keeping in view the spirit and purpose of the Arbitration Act, the several attempts made on behalf of the petitioner as well as the procedure laid down under the GCC, which was followed by the petitioner before approaching this Court, the requisites of arbitrability and Notice under Section 21 of the Arbitration Act invoking arbitration, this Court refers the disputes between the parties to arbitration. Accordingly, the following Order:

ORDER

- (i) Justice Arijit Pasayat, Former Judge, Supreme Court of India is appointed as Sole Arbitrator to adjudicate the disputes between the parties;
- (ii) The learned sole arbitrator, before entering the arbitration reference, shall ensure the compliance of Section 12(1) of the Arbitration and Conciliation Act, 1996;
- (iii) The learned sole arbitrator shall be paid fees as prescribed under The Delhi International Arbitration Centre (Administrative Cost and Arbitrators Fees) Rules, 2018 as amended vide notification dated 15th November, 2022;
- (iv) At the first instance, the parties shall appear before the learned sole arbitrator within 20 days from today on a date which may be mutually fixed by the learned sole arbitrator;
- (v) All contentions of the parties are expressly kept open.

30. A copy of the order be forwarded to the learned sole arbitrator on the following address:

Justice Arijit Pasayat, Former Judge, Supreme Court of India
Address- 98, Sector-27, NOIDA, Uttar Pradesh-201301

E-mail ID- apasayat@gmail.com

Contact No.— +91 9971090200

31. With the aforesaid directions, the instant petition is disposed of alongwith pending applications, if any.

32. The order be uploaded on the website forthwith.

APRIL 19, 2023

dy/ms

CHANDRA DHARI SINGH, J

Click here to check corrigendum, if any

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