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

% **Pronounced on: 14.08.2023**

+ **ARB.P. 326/2023**

Y.K.GOYAL

..... Petitioner

Through: **Mr. J.K. Nayyar, Adv.**

versus

DELHI URBAN SHELTER

IMPROVEMENT BOARD & ORS

..... Respondents

Through: **Mr. Anuj Chaturvedi and Ms. Richa Dhawan, Advs.**

CORAM:

HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

SACHIN DATTA, J.

Factual Background

1. The present petition has been preferred under Section 11(6) of the Arbitration and Conciliation Act, 1996 (the 'A&C Act') seeking appointment of an independent sole arbitrator to adjudicate the dispute between the parties.
2. The disputes between the parties have arisen under an Agreement dated 23.02.2017 for 'Construction of 100 seater JSC/toilets at JJ Cluster G.T. Road, Lal Bagh, Delhi'. The petitioner was awarded the said work vide letter no. WI/6031/117/PG/EC-7/2016-17 D-253 dated 23.02.2017, issued by respondent no.3/Executive Engineer, pursuant to an e-tender.



3. The relevant arbitration clause is contained in the applicable General Conditions of Contract. Clause 25 thereof reads as follows:

“ Clause 25 :- Settlement of Disputes & Arbitration

Except where otherwise provided in the contract all questions and disputes relating to the meaning of the specification, 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 things whatsoever, in any way arising out of or these condition 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 consider any works demanded of him to be outside the requirement 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 the written instruction or decision. Thereupon, the Superintending Engineer shall give his written instruction 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 60 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 shall give his decision within a period of 60 days, from the receipt of Contractor's appeal. The constitution of Dispute Redressal Committee shall be as indicated in Schedule F. If the Dispute Redressal Committee fails to give his decision within the aforesaid period or any party is dissatisfied with the decision of Dispute Redressal Committee, then either party may within a period of 60



days from the receipt of the decision of 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 for 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 DUSIB, in charge of the work or if there is no Chief Engineer, the Member Engineering DUSIB if there is no member Engineering then CEO (DUSIB). 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, DUSIB or Member Engineering, DUSIB or CEO DUSIB as aforesaid should act as Arbitrator and if for any reason that is not possible, the matter shall not be referred to Arbitrator at all.

It is also a term of the contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claim 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 DUSIB 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 and 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 proceedings under this clause.

It is also a term of this contract that arbitrator shall adjudicate only such disputes as are referred to him by the appointing authority and give separate awards against each disputes 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 issued the 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 the award including 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 cost to be so paid."

4. Pursuant to the award of the contract, the petitioner is stated to have commenced construction work; however, a letter dated 15.09.2017 was issued by the Executive Engineer (Respondent no. 3) directing the petitioner to maintain the status quo in view of the order(s) passed in W.P. (C) No. 7869/2017 titled as '*Resident Welfare Association Mahendru Enclave and others vs. Govt. of NCT, Delhi & others*'.

5. The petitioner is said to have raised bill/s on 13.12.2017 and again on 11.06.2018 to the Executive Engineer (Respondent no.3), seeking payment/s qua the aforesaid agreement.

6. Subsequently, the petitioner issued another letter dated 30.05.2019, once again enclosing its bill/s. Thereafter, the petitioner issued a letter dated 18.06.2019 to the Executive Engineer (Respondent no.3) seeking foreclosure of the agreement dated 23.02.2017. The same reads as under:

"Dear Sir,

Please refer to our firms letters Dated 07.12.2018(letter No.R-7743/EE/C-7/2018) & Dated 30.05.2019(letter no.R-1605/EE/C-7/2019) regarding foreclosure of above said work.



As you aware that above mentioned site is not available to us since last two years and in near future there is no hope for its availability due to pending court cases.

Hence, you are requested to foreclose our above said work agreement and release our balances as stated in our previous letters without any further delay.”

7. Learned counsel for the petitioner submits that since no reply was sent to the aforesaid correspondence by the Executive Engineer (Respondent no.3), the petitioner issued another letter dated 13.07.2019 to the Chief Engineer, DUSIB (Respondent no.1) invoking the aforementioned Clause-25 of the said agreement. The same reads as follows:

*“Dear Sir,
Please refer to our firms letters Dated 07.12.18 (letter No.R-7743/EE/C-7/2018) & Dated 30.05.2019 (letter no.R-1605/EE/C-7/2019) & Dated 19.09.2019 (letter no.R-1839/EE/C-7/2018) same to SE-III(Speed post:ED210858068IN), same to you CE-II (Speed post:ED210858071IN) regarding foreclosure of above said work. No action has been taken so far from your side, due to which I am facing huge amount of losses.*

All the claims are already been submitted to your EE C-7, vide letter Dated 30.05.2019 (letter no.R-1605/EE/C-7/2019).

I appeal you to make my payment within 30 days, as per CLAUSE 25(i)-Settlement of Disputes &Arbitration.”

8. The petitioner also issued a letter dated 31.10.2020 addressed to the Chief Executive Officer, DUSIB, IAS i.e. Ms. G.S. Meena seeking settlement of its claim/s. No reply thereto is stated to have been sent on behalf of the respondents.

9. Learned counsel for the petitioner submits that despite several attempts to resolve the matter, the respondents have failed to make payments of its outstanding bill/s.



10. Finally, the petitioner sought to invoke the arbitration vide its letter dated 16.12.2022, whereby the petitioner has raised various claims amounting to Rs. 45,24,425/- along with 18% interest p.a. on the claim amount. No reply thereto was sent by the respondents.

11. Learned counsel on behalf of the respondents opposes the present petition on the ground that the claim/s sought to be raised are time barred. It is also sought to be contended that the petition is premature in nature since the petitioner has failed to take recourse to the Dispute Resolution Committee (DRC) as contemplated in Clause 25 (supra).

12. In the facts of the present case, the aforesaid objections cannot come in the way of constituting an Arbitral Tribunal to adjudicate the dispute/s between the parties.

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).

14. As regards the contention regarding the claim/s being barred by limitation, the same being a mixed question of fact and law, requires detailed examination which, in the facts of the present case, would be best



left to a duly constituted Arbitral Tribunal. In ***BSNL v. Nortel Networks (India) (P) Ltd.***¹, 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.”

15. In view of the judgement of the Supreme Court in ***Perkins Eastman Architects DPC v. HSCC (India) Ltd.***², an independent Arbitrator is required to be appointed to adjudicate the dispute/s between the parties.

16. Accordingly, Mr. D. N. Ray, Advocate (Mobile No.: 9810025196) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

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

18. 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; and in the event there is any

¹(2021) 5 SCC 738

²(2020) 20 SCC 760



impediment to the appointment on that count, the parties are given liberty to file an appropriate application in this court.

19. 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.

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

21. 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.

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

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

SACHIN DATTA, J

AUGUST 14, 2023

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