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

% **Date of Decision: 21.08.2023**

+ **ARB.P. 840/2023**

PELE KHEZHIE

..... Petitioner

Through: Ms. Amrita Panda and Mr. Aditya Kumar, Advs.

versus

NATIONAL HIGHWAYS AND INFRASTRUCTURE
DEVELOPMENT CORPORATION LIMITED

..... Respondent

Through: Ms. Rajdipa Behura, Mr. Philomon Kani, Mr. Ashray Behura, Ms. Neha Dobriyal, Ms. Hansika Sahu, Mr. Ashutosh Namdev and Mr. Ashok Kumar Jha, Advs.

+ **O.M.P.(I) (COMM.) 217/2023 and IA No.12528/2023 (Stay)**

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..... Petitioner

Through: Ms. Amrita Panda and Mr. Aditya Kumar, Advs.

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..... Respondent

Through: Ms. Rajdipa Behura, Mr. Philomon Kani, Mr. Ashray Behura, Ms. Neha Dobriyal, Ms. Hansika Sahu, Mr. Ashutosh Namdev and Mr. Ashok Kumar Jha, Advs.

CORAM:

HON'BLE MR. JUSTICE SACHIN DATTA



SACHIN DATTA, J. (Oral)

ARB.P 840/2023

1. The present petition under Section 11 of the Arbitration and Conciliation Act 1996 (the “A&C Act”) seeks appointment of an independent sole arbitrator to adjudicate the dispute between the parties.
2. The disputes between the parties have arisen in the context of a tender process initiated by the respondent for “*Construction of two lane with paved shoulder of Kohima-Bypass Road connecting NH-39 (New NH-02), NH-150 (New NH-02), NH-61 (New NH- 29) and NH-39 (New NH-02) from Design Km 32.00 to design Km 43.454 [Design Length – 11.454 Km] in the state of Nagaland under SARDP-NE on EPC Mode (Package IV).*” The bid submitted by the petitioner for the said tender was accepted by the respondent vide Letter of Acceptance dated 14.08.2020. Accordingly, the petitioner and the respondent entered into the Engineering, Procurement and Construction Contract dated 05.09.2020.
3. The stipulated date for completion of the work was 18 months from the appointed date. For slow progress of work and non-completion of milestones by the petitioner, the respondent, vide letter 07.03.2023, declared the petitioner a Non-Performer. Further, vide letter dated 17.04.2023, the respondent sought to levy liquidated damages on the petitioner, and vide letter dated 22.05.2023 issued notice of intention to terminate the Contract. The petitioner contends that the sole reason the progress of work was slow and the milestones were not achieved, was the non-provision of the ‘Right of Way’ by the respondent as per its contractual obligations.



4. A petition under Section 9 of the A&C Act has also been filed by the petitioner seeking stay of the respondent's letter dated 07.03.2023, restraining the respondent from taking any coercive or precipitative action on the basis of the letter dated 22.05.2023 and seeking status quo in relation to the Performance Bank Guarantees.

5. The Contract Agreement contains a dispute resolution clause in the following terms:

“
Article 26
Dispute Resolution

26.1 Dispute Resolution

(i) Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the "Dispute") shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 26.2.

(ii) The Parties agree to use their best efforts for resolving all Disputes arising under or in respect of this Agreement promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all nonprivileged records, information and data pertaining to any Dispute.

26.2 Conciliation

In the event of any Dispute between the Parties, either Party may call upon the Authority's Engineer, or such other person as the Parties may mutually agree upon (the "Conciliator") to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Conciliator or without the intervention of the Conciliator, either Party may require such Dispute to be referred to the Chairman of the Authority and the Chairman of the Board of Directors of the Contractor for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) business days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the 30 (thirty) business day period or the Dispute is not amicably settled within 30 (thirty) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30 (thirty) days of the notice in writing referred to in Clause 26.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 26.3 but before resorting to such arbitration, the parties agree to



explore conciliation by the Conciliation Committees of Independent Experts set up by the Authority in accordance with the procedure decided by the panel of such experts and notified by the Authority on its website including its subsequent amendments. In the event of the conciliation proceedings being successful, the parties to the dispute would sign the written settlement agreement and the conciliators would authenticate the same. Such settlement agreement would then be binding on the parties in terms of Section 73 of the Arbitration Act. In case of failure of the conciliation process even at the level of the Conciliation Committee, either party may refer the Dispute to arbitration in accordance with the provisions of Clause 26.3.

26.3 Arbitration

(i) Any dispute which remains unresolved between the parties through the mechanisms available/ prescribed in the Agreement, irrespective of any claim value, which has not been agreed upon/ reached settlement by the parties, will be referred to the Arbitral Tribunal as per the Arbitration and Conciliation Act.

(ii) Deleted

(iii) The Arbitral Tribunal shall make a reasoned award (the "Award"). Any Award made in any arbitration held pursuant to this Article 26 shall be final and binding on the Parties as from the date it is made, and the Contractor and the Authority agree and undertake to carry out such Award without delay.

(iv) The Contractor and the Authority agree that an Award may be enforced against the Contractor and/or the Authority, as the case may be, and their respective assets wherever situated.

(v) This Agreement and the rights and obligations of the Parties shall remain in full force and effect, pending the Award in any arbitration proceedings hereunder. Further, the parties unconditionally acknowledge and agree that notwithstanding any dispute between them, each Party shall proceed with the performance of its respective obligations, pending resolution of Dispute in accordance with this Article.

(vi) In the event the Party against whom the Award has been granted challenges the Award for any reason in a court of law, it shall make an interim payment to the other Party for an amount equal to 75% (seventy five per cent) of the Award, pending final settlement of the Dispute. The aforesaid amount shall be paid forthwith upon furnishing an irrevocable Bank Guarantee for a sum equal to 120 % (one hundred and twenty per cent) of the aforesaid amount. Upon final settlement of the Dispute, the aforesaid interim payment shall be adjusted and any balance amount due to be paid or returned, as the case may be, shall be paid or returned with interest calculated at the rate of 10% (ten per cent) per annum from the date of interim payment to the date of final settlement of such balance."



6. The petitioner invoked the aforesaid arbitration clause vide letter dated 24.07.2023. However, no reply thereto was sent by the respondent.

7. Learned counsel for the respondent does not dispute the existence of the arbitration agreement between the parties. However, she submits that the present petition is premature on two counts (i) before resorting to arbitration, the petitioner has not taken recourse to conciliation as contemplated under Article 26.2 of the Contract; it is submitted that use of the word “shall” in Article 26.1 of the Contract clearly demonstrates that referring the disputes to conciliation is mandatory prior to invocation of arbitration and (ii) no disputes have arisen between the parties as the respondent has only issued a notice of intention to terminate and has not yet terminated the contract.

8. *Per contra*, the learned counsel for the petitioner submitted that the process of conciliation as contemplated in Article 26.2 is directory in nature. She further submits that disputes have arisen between the parties and the same is evident from the fact that the respondent has issued a notice of intention to terminate dated 22.05.2023; the subsistence of serious disputes is further evident from the letters of the respondent wherein it had declared the petitioner as a ‘non-performer’ and has sought to impose liquidated damages on the petitioner.

9. Having perused the record and having heard learned counsel for the parties, I am unable to agree with the objections raised by learned counsel for the respondent.

10. In the context of a similar arbitration clause, this Court in ***Ranjit Construction Co. v. Gujarat State Road & Building Department¹*** considered the judgments in the case of ***Oasis Projects Ltd. v. National***



Highway & Infrastructure Development Corpn. Ltd.², Kunwar Narayana v. Ozone Overseas Pvt. Ltd.³, Demarara Distilleries Pvt. Ltd. v. Demerara Distilleries Ltd.⁴, Ravindra Kumar Verma v. BPTP Ltd⁵ and Subhash Infraengineers (P) Ltd. v. NTPC Ltd.⁶, has held as under:-

“6. In the reply filed on behalf of the respondents to the present petition, the only objection raised by the respondents is that the petitioner has not complied with Article 26.2 of the contract agreement and therefore, the present petition is premature. Learned counsel for the respondents also submits that before resorting to arbitration in accordance with Article 26.3, it is mandatory for the parties to exhaust pre-arbitral steps and take recourse to conciliation in terms of Article 26.2.

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9. In the context of a similar arbitration clause, it has been held by this Court in Oasis Projects Ltd. v. National Highway & Infrastructure Development Corpn. Ltd, as under:—

“12. The primary issue to be decided in the present petition is, therefore, as to whether it was mandatory for the petitioner to resort to the conciliation process by the Committee before invoking arbitration. Though Article 26.2 clearly states that before resorting to arbitration, the parties agree to explore conciliation by the Committee, in my opinion, the same cannot be held to be mandatory in nature. It needs no emphasis that conciliation as a dispute resolution mechanism must be encouraged and should be one of the first endeavours of the parties when a dispute arises between them. However, having said that, conciliation expresses a broad notion of a voluntary process, controlled by the parties and conducted with the assistance of a neutral third person or persons. It can be terminated by the parties at any time as per their free will. Therefore, while interpreting Article 26.2, the basic concept of conciliation would have to be kept in mind.”

10. In Kunwar Narayana v. Ozone Overseas Pvt. Ltd., this Court relied upon the judgment of the Supreme Court in Demarara Distilleries Pvt. Ltd. v. Demerara Distilleries Ltd. and the decision of this Court in Ravindra Kumar Verma v. BPTP Ltd., held as under:—

¹ 2023 SCC OnLine Del 3905

² (2023) 1 HCC (Del) 525

³ 2021 : DHC : 496

⁴ (2015) 13 SCC 610

⁵ 2014 SCC OnLine Del 6602

⁶ 2023 SCC OnLine Del 2177



“5. Ms. Pahwa, learned Counsel for the respondents submitted that her only objection, to the petition, was that the petitioner has not exhausted the avenue of amicable resolution, contemplated by Clause 12 of the Share Buyback Agreement. I am not inclined to agree with this submission. The recital of facts, as set out in the petition, indicate that efforts at trying to resolve the disputes, amicably were made, but did not succeed. Even otherwise, the Supreme Court in Demarara Distilleries Pvt. Ltd. v. Demerara Distilleries Ltd. and this Court, in its judgment in Ravindra Kumar Verma v. BPTP Ltd., opined that relegation of the parties to the avenue of amicable resolution, when the Court is moved under Section 11(6) of the 1996 Act, would be unjustified, where such relegation would merely be in the nature of an empty formality. The arbitration clause in the present case does not envisage any formal regimen or protocol for amicable resolution, such as issuance of a notice in that regard and completion of any stipulated time period thereafter, before which arbitral proceedings could be invoked. In the absence of any such stipulation, I am of the opinion, following the law laid down in Demarara Distilleries Pvt. Ltd. and Ravindra Kumar Verma v. BPTP Ltd. nothing worthwhile would be achieved, by relegating the parties to explore any avenue of amicable resolution. Besides, the appointment of an arbitrator by this Court would not act as an impediment in the parties resolving their disputes amicably, should it be possible at any point of time.”

11. This court in *Subhash Infraengineers (P) Ltd. v. NTPC Ltd.* held as under:—

“21. In this regard, it is relevant to note that in terms of Section 62(3) of the Act, it is open for a party to reject the invitation to conciliate. Further, in terms of Section 76 of the Act, the conciliation proceedings can be terminated by a written declaration of a party and there is no legal bar in this regard. In the present case, Clause 7.2.5 of the GCC expressly provides that “parties are free to terminate Conciliation proceedings at any stage as provided under the Arbitration and Conciliation Act, 1996.”

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28. In the present case, the clause/pre arbitral mechanism contemplates mutual consultation followed by conciliation. As noticed in Abhi Engg. and Oasis Projects, conciliation is a voluntary process and once a party has opted out of conciliation, it cannot be said that the said party cannot take recourse to dispute resolution through arbitration.”



12. As such, there is no merit in the objection raised by the respondents.”

11. In ***Oasis Projects*** (supra), which case incidentally was against the present respondent and in the context of a similar arbitration clause, this court has specifically held as under:

“15. In Ravindra Kumar Verma case’ this Court had stated that any doubt on the aspect of whether conciliation proceedings, as required by the arbitration clause, is directory or mandatory in nature, is removed when reference is placed on Section 77 of the Act, which reads as under :

“77. Resort to arbitral or judicial proceedings

The parties shall not initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject-matter of the conciliation proceedings except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.”

16. Section 77 of the Act as also Clause 16 of the OM state that where, in the opinion of a party, immediate initiation of the arbitral proceedings is necessary to preserve the rights of the said party, the said party may initiate arbitral or judicial proceedings even during the conciliation proceedings. Therefore, in case of urgency, arbitral proceedings can be initiated even when conciliation proceedings are pending. To determine whether there is such an urgency or it is necessary to immediately invoke arbitration, it is the opinion of the party concerned which is the relevant and the governing factor. This is so because conciliation, as noted hereinabove, is a voluntary process and by its very nature directory. It can be terminated at any point of time by any party.

17. In the present case, it is also to be noted that in terms of Article 23.1(v) of the contract, in case the respondent terminates the contract, the petitioner shall be deemed to have been debarred for a period of two years and shall not be able to bid any contract of the respondent. The petitioner also fears the invocation of the performance guarantee. Therefore, in terms of Section 77 read with Clause 16 of the OM, the petitioner is justified in expressing urgency in initiating arbitration for preserving its rights.”

12. In the present case, grave urgency has been expressed by the petitioner in seeking reference of the disputes to the arbitration



inasmuch the respondent has issued a notice of intention to terminate the contract. In the circumstances, in view of the urgent adjudication sought by the petitioner, it would be unwarranted to relegate the petitioner to conciliation. As held in *Oasis Projects* (supra) and *Subhash Infraengineers* (supra), Section 77 of the A&C Act itself contemplates that notwithstanding any conciliation proceedings, it is open to a party to initiate arbitration proceedings where such proceedings are necessary for preserving its rights.

13. As such, there is no merit in the contentions raised by learned counsel for the respondent that it is not open to the petitioner to seek arbitration till the conciliation process, contemplated in Article 26.2 (supra) is exhausted.

14. The judgment in the case *Sushil Kumar Bhardwaj v. Union of India*⁷, relied upon by the respondent has been specifically distinguished in *Oasis Projects* (supra) as under:

“19. In Sushil Kumar Bhardwaj case, the court was considering an arbitration agreement wherein the contractor was first to raise the dispute with the Superintending Engineer, and in case the Superintending Engineer fails to give his instructions or “decision in writing” or the contractor is dissatisfied with such instructions or decision, the contractor was to appeal the same 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 was thereafter to give his “decision” within a period of 30 days of receipt of contractor’s appeal. It was only thereafter that the contractor could invoke the arbitration. In such circumstances, the court held that the contractor must follow the procedure prescribed before approaching the court under Section 11 of the Act. In the said case, therefore, the procedure prescribed was multitiered and arbitration was to be invoked on failure of the previous stages of the said procedure.”

⁷ 2009 SCC OnLine Del 4355



15. Also, in ***Subhash Infraengineers*** (supra), it has been held as under:

25. Learned counsel for the respondent has relied upon the judgment of this court in the case of Chabbras Associates v. HSCC India Limited, where the court refused to exercise jurisdiction under Section 11 of the Act on the ground that the procedure prescribed in the arbitration agreement in that case was not adhered to. It is noticed that arbitration clause in the said case was in the following terms:—

Xx xx xx

26. A bare perusal of the aforesaid clause makes it evident that the same mandated reference of the disputes to a “Reviewing Authority” and thereafter to, “Appealing Authority” followed by another appeal to the “Disputes Redressal Committee (DRC)”. In the context of Chabbras Associates (supra), the aforesaid authorities were entrusted to perform an adjudicatory function after hearing the parties. In fact, the relevant clause which fell for consideration in the said case, specifically mentioned that it was open for the contractor to “offer evidence in support of his appeal” before the appealing authority. It was in this context that this Court felt that bypassing the aforesaid authorities and straightaway filing a petition under Section 11 of the Act seeking appointment of an arbitrator, was not apposite in the facts of that case and in view of the nature of the arbitration clause.

27. Likewise, the arbitration clause that fell for consideration by this Court in Sushil Kumar Bhardwaj v. Union of India was similar to the clause in case of Chabbras Associates and is quite different from the clause in the present case.”

16. Likewise, the judgment in the case of ***Sanjay Iron and Steel Limited v. Steel Authority of India***,⁸ relied upon by the respondent, is distinguishable and has to be read in the context of the peculiar facts of the said case. In that case, the petitioner itself had invoked the conciliation mechanism under the agreement and it was only the fee of the Conciliator that was stated to be the impediment. The proceedings before the Conciliator did not commence due to non-payment of fees and it was in that context that

⁸ 2021 SCC OnLine Del 4566



the Court directed the parties to first explore the possibility of resolution of disputes through conciliation.

17. It may also be noted that constituting an arbitral tribunal does not preclude the possibility of the parties pursuing a settlement of the *inter se* disputes. Section 30 of the A&C Act specifically provides that an arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitration proceedings to encourage settlement.

18. The judgment of the Karnataka High Court in *M/s Sobha Limited vs M/s Nana Vishwa Shahi Vijaya*⁹, is also clearly distinguishable in the facts and circumstances of the case. In the said case, the court was not seized of a situation where any urgency, of the nature contemplated in Section 77 of the A&C Act, was emphasized or urged by the petitioner. In the facts and circumstances of that case, considering that only monetary relief had been claimed by the petitioner therein, the court deemed it appropriate to hold that recourse to conciliation was essential before taking recourse to arbitration. The said judgment cannot be applied to the facts and circumstances of the present case.

19. There is also no merit in the objection raised by the respondent that no dispute subsists between the parties. The very fact that the respondent has declared the petitioner as a ‘non-performer’, imposed liquidated damages and issued a notice of intention to terminate, clearly demonstrates that serious disputes have arisen between the parties.

20. In view of the aforesaid and since the existence of the arbitration agreement is not in dispute, there is no impediment in appointing an independent sole arbitrator to adjudicate the disputes between the parties.



21. Accordingly, Ms. Justice (Retd.) Mukta Gupta, Former Judge, Delhi High Court (Mobile – 9650788600) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.
22. The respondent shall be entitled to raise preliminary objections as regards jurisdiction/arbitrability of the claims sought to be raised, which shall be decided by the arbitrator, in accordance with law.
23. 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.
24. The learned Sole Arbitrator shall fix her fees in consultation with the parties.
25. Parties shall share the arbitrator's fee and arbitral costs, equally.
26. 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.
27. Needless to say, nothing in this order shall be construed as an expression of this court on the merits of the case.
28. The present petition stands disposed of in the above terms.

O.M.P.(I) (COMM.) 217/2023 and IA No.12528/2023 (Stay)

29. Since an Arbitral Tribunal has been constituted to adjudicate the disputes between the parties, it would be appropriate if the present petition alongwith the pending application, is relegated before the learned Sole

⁹ Judgement dated 10.05.2022 passed in C.M.P. No. 24/2022.



Arbitrator to be treated and dealt with as an application under Section 17 of the Arbitration & Conciliation Act, 1996. It is directed accordingly.

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

SACHIN DATTA, J

AUGUST 21, 2023/hg