



\$~J-2

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

Judgment reserved on: 01.06.2023
Judgment pronounced on: 10.07.2023

+ **ARB.P. 1252/2022**

M/S RANJIT CONSTRUCTION COMPANY Petitioner
 Through: Mr. Subhash Chawla, Adv.

versus

GUJARAT STATE ROAD & BUILDING DEPARTMENT & ORS Respondents
 Through: Ms. Ripin Sood, Adv.

CORAM:
HON'BLE MR. JUSTICE SACHIN DATTA

JUDGMENT

SACHIN DATTA, J.

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 respondents for work of "*Strengthening of Km. 572/000 to 609/000 (Tarsada-Kanja-Vyara-Kapura Section) of N.H.-56 in the State of Gujarat on EPC Mode*". The petitioner submitted its bid for the work on 25.05.2021. The bid of the petitioner was found to be lowest and it was issued a Letter of Intent dated 03.07.2021. The petitioner was thereafter called upon to furnish Security Deposit and Performance Bond. The petitioner complied with the said requirements and the said work was consequently awarded in favour of the petitioner vide work order dated



02.08.2021. The stipulated period of completion of the work was nine months from the date of the work order and thus the work was required to be completed on or before 01.05.2022. The said work could not be completed within the stipulated time period. Consequently, certain disputes have arisen between the parties.

3. Article 26 of the contract agreement between the parties contains an arbitration 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 non-privileged 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.”

4. Article 27 of the contract agreement states that courts at Delhi shall have exclusive jurisdiction over matters arising out of or relating to the said agreement. Before filing the present petition, the petitioner had filed a similar petition before the Gujarat High Court; however, in view of Article 27, the said petition was withdrawn with liberty to file appropriate petition before this court.

5. The petitioner vide letter-cum-legal notice dated 06.06.2022 invoked the aforesaid arbitration agreement and raised certain claims upon the respondents. Vide the said communication, the petitioner also proposed names of certain persons for appointment as arbitrator(s). In reply thereto dated 06.07.2022, the respondents called upon the petitioner to comply with the Article 26.2 of the contract agreement before a reference to arbitration can be made.

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.



7. *Per contra*, the learned counsel for the petitioner submitted that the process of conciliation as contemplated in Article 26.2 is directory in nature.

8. Having heard the respective counsel for the parties, I find no merit in the contentions raised by the respondents.

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.***¹, 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 vs. M/s Ozone Overseas Pvt. Ltd. &Anr.***², this Court relied upon the judgment of the Supreme Court in ***Demarara Distilleries Pvt. Ltd. vs. Demerara Distilleries Ltd.***³ and the decision of this Court in ***Ravindra Kumar Verma vs. BPTP Ltd.***⁴, held as under:-

“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

¹ (2023) 1 HCC (Del) 525

² 2021:DHC:496

³ (2015) 13 SCC 610

⁴ MANU/DE/3028/2014



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.***,⁵ 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."

xxx

xxx

xxx

28. In the present case, the clause/pre arbitral mechanism contemplates mutual consultation followed by conciliation. As noticed in AbhiEngg. 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.
13. Respective counsel for the parties are *ad idem* that the contract agreement in the present case is exempted from being charged with stamp

⁵ 2023 SCC OnLine Del 2177



duty in view of proviso to Section 3 of the Indian Stamp Act, 1899 and there is no controversy on that count.

14. In the circumstances, there is no impediment in constituting an Arbitral Tribunal to adjudicate the disputes between the parties. Accordingly, Mr. Justice (Retd.) M.R. Shah, Former Judge, Supreme Court of India (Mobile No. 9825049081) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

15. The respondents shall be entitled to raise preliminary objections as regards arbitrability/maintainability of the claims which shall be decided by the arbitrator, in accordance with law.

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

17. 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.

18. Parties shall share the arbitrator's fee and arbitral costs, equally.

19. 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.

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

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

JULY 10, 2023/hg

SACHIN DATTA, J