

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

Reserved on: 25.01.2023

Date of decision: 07.02.2023

+ **ARB.P. 1364/2022**

M/S OASIS PROJECTS LTD

..... Petitioner

Through: Mr. Bharat Chugh & Mr.
Siddharth Shiva Kumar, Advs.

versus

MANAGING DIRECTOR, NATIONAL HIGHWAY AND
INFRASTRUCTURE DEVELOPMENT CORPORATION
LIMITED

..... Respondent

Through: Mr. Debal Kumar Banerjee, Sr.
Adv. with Mr. Dharmender
Verma & Mr. Vishal Singh,
Advs.

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition has been filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Act') seeking appointment of an Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the "Balance work for Four-Laning of NH-39 Dimapur-Kohima Road from Design 152.490 to Km. 166.700 (Existing Km 156.000 to Km. 172.900), in the State of Nagaland under SARDP-NE through an Engineering, Procurement and Construction (EPC) Contract (Package -III)" (hereinafter referred to as the "Contract").

2. The Arbitration Agreement between the parties is contained in Article 26 of the Agreement, which is reproduced hereinunder:-

"Article 26

Dispute Resolution

26.1 Dispute Resolution

- (i) *Any dispute, difference or controversy of
whatever nature howsoever arising*

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*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.*

xxxxx”

(Emphasis supplied)

3. Disputes arose between the parties pursuant to the alleged Notice of Termination of the Contract dated 17.08.2022 by the petitioner and the Notice for intention to Terminate the Contract dated 16.11.2022 issued by the respondent. The petitioner invoked the Arbitration Agreement vide notice dated 19.11.2022. In response, the

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respondent, vide letter dated 25.11.2022, called upon the petitioner to first explore Conciliation by the Conciliation Committees of Independent Experts (hereinafter referred to as the 'Committee'), as provided in Article 26.2 of the Contract. However, the petitioner proceeded to file the present petition.

4. The learned senior counsel for the respondent maintains that the present petition is not maintainable as the petitioner has failed to follow the procedure prescribed for invocation of the arbitration, as contained in Article 26 of the Contract. He submits that Article 26.2 specifically states that the parties agree to explore Conciliation by the Committee before resorting to arbitration. He submits that as the petitioner has failed to follow the said procedure, the present petition is liable to be dismissed on the ground of it being premature. In support, he places reliance on the judgment of the Supreme Court in *Iron & Steel Co. Ltd. v. Tiwari Road Lines*, (2007) 5 SCC 703 and of this Court in *Sushil Kumar Bhardwaj v. Union of India*, 2009 SCC Online Del 4355.

5. The learned senior counsel for the respondent, placing reliance on the judgment of *Bharat Sanchar Nigam Limited and Another v. Nortel Networks India Private Limited*, (2021) 5 SCC 738, submits that the petitioner approached this Court without giving adequate time to the respondent to reply to its request for arbitration and to bring to the notice of the petitioner that the Committee has been set up by the respondent. He submits that, therefore, the present petition is not maintainable.

6. On the other hand, the learned counsel for the petitioner submits that the process of Conciliation as mentioned in Article 26 is directory in nature. He submits that such Conciliation process cannot, in any

manner, affect the right of the petitioner to invoke the Arbitration Agreement. He further submits that before invoking arbitration, the petitioner had taken steps to arrive at an amicable settlement of disputes with the respondent, however, such attempts had failed. He submits that, therefore, the present petition cannot be said to be premature. In support, he places reliance on *Visa International Limited v. Continental Resources (USA) Limited*, (2009) 2 SCC 55; *Ravindra Kumar Verma v. M/s BPTP Ltd. & Anr.*, 2014 SCC OnLine Del 6602; *Saraswati Construction Company v. East Delhi Co-operative Group Housing Society Ltd.*, 1994 SCC OnLine Del 563; *Sarvesh Security Services Pvt. Ltd. v. Managing Director, DSIIDC*, 2018 SCC OnLine Del 7996; *Siemens Limited v. Jindal India Thermal Power Limited*, 2018 SCC OnLine Del 7158; *Union of India v. M/s Baga Brothers & Anr.*, 2017 SCC OnLine Del 8989; *M/s Sikand Construction Co. v. State Bank of India*, 1978 SCC OnLine Del 180; *M/s IMZ Corporate Pvt. Ltd. v. MSD Telematics Pvt Ltd.*, ARB. P 204/2021; *Demerara Distilleries Private Limited v. Demerara Distillers Limited*, (2015) 13 SCC 610; *Quick Heal Technologies Limited v. NCS Computech Private Limited*, (2020) SCC OnLine Bom 693; and *Republic of Sierra Leone v. SL Mining Ltd.*, [2021] EWHC 268 (Comm).

7. He further submits that the respondent having refused to give consent to the appointment of an Arbitrator, the petitioner need not have waited for a period of 30 days before approaching this Court.

8. He submits that as on the date of filing of the present petition, the website of the respondent did not reflect/provide the constitution or the procedure of the Committee.

9. On the submission of the website not reflecting the constitution or procedure of the Committee, the learned senior counsel for the respondent submits that though the constitution as also the procedure was duly available on the website of the respondent, it was available under the icon 'MoA (Memorandum of Association) & Notices'. He submits that now the same is duly reflected under a separate icon of 'Dispute Resolution Mechanism'. He submits that had the petitioner given sufficient time to the respondent to respond on the above, the respondent would have pointed out the icon under which the petitioner can access the constitution as also the procedure of the Committee.

10. I have considered the submissions made by the learned counsels for the parties.

11. As far as the constitution and the procedure of the Committee not being available on the website of the respondent on the date of filing of the petition is concerned, for the reason that the case of the petitioner is that such procedure even otherwise is directory in nature and is not to be mandatorily followed prior to invoking the arbitration, in my opinion, the same need not detain this Court any further. *Prima facie*, however, the respondent has been able to satisfy this Court that the information regarding the constitution and the procedure of the Committee was available on the website of the respondent *albeit* under an obscure link.

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.

13. In addition to the above, even the Office Memorandum dated 03.07.2020 (hereinafter referred to as the 'OM'), giving the establishment, constitution and procedure of the Committee, published by the respondent on its website, clearly evidences that such Conciliation process is voluntary and can be resorted to only where the Contractor agrees to such process after the disputes have arisen and inspite of the earlier agreement, as recorded in the Agreement. Clause 3.1 of the OM is reproduced hereinunder:-

“3.1 On receipt of a reference from the Contractor (reference to Contractor made herein includes Consultant/Concessionaire) as per provision in the agreement for conciliation of disputes, the Concerned Technical Division shall send a response within 7 working days. NHIDCL shall offer the other party to refer the matter to the Conciliation Committee of Independent Experts as the conciliation is intended to be one consolidated package of settlement. Subject to consent of the other party, the matter would be referred to CCIE established under these guidelines.”

(Emphasis supplied)

14. A reading of the above Clause would show that the respondent, on receipt of a notice from the Contractor, shall ‘offer’ the Contractor to refer the matter to the Committee. It is subject to the consent of the Contractor that the matter would eventually be referred to the Committee.

15. In ***Ravindra Kumar Verma*** (Supra), 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.”

(Emphasis supplied)

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.

18. In ***Iron & Steel Co. Ltd.*** (Supra), the Court was considering an Arbitration Agreement which provided that the disputes between the parties shall be settled by arbitration in accordance with the rules of arbitration of the Indian Council of Arbitration. It was not disputed therein that the party approaching the Court did not make any effort to have the disputes settled in accordance with rules of arbitration of the Indian Council of Arbitration and, on the contrary, had straightaway moved an application under Section 11 of the Act. It was in those facts that the Supreme Court held that the agreed procedure having not been followed, the petition under Section 11 of the Act was not maintainable.

19. In ***Sushil Kumar Bhardwaj*** (Supra), 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 multi-tiered and arbitration was to be invoked on failure of the previous stages of the said procedure.

20. As far as the submission of the learned senior counsel for the respondent that the petitioner should have waited for the respondent to have informed the petitioner of the website duly showing the constitution of the Committee, and, in any case, for a period of 30 days, in my opinion, also deserves to be rejected. In ***Bharat Sanchar Nigam Limited and Another*** (Supra), the Supreme Court has held that the period for filing of the petition under Section 11 of the Act arises upon the failure of the parties to appoint an Arbitrator. In the present case, with the respondent, vide its notice dated 25.11.2022, insisting upon the petitioner to first initiate the Conciliation process by the Committee before seeking initiation of arbitration, the failure for appointment of the Arbitrator occurred. The present petition, therefore, cannot be said to be premature.

21. As the Arbitration Agreement and due invocation thereof are established, I see no impediment in appointing an Arbitrator for adjudicating the disputes that have arisen between the parties in relation to the Contract.

22. I accordingly appoint Mr. Justice Manmohan Sarin, Former Chief Justice of Jammu & Kashmir High Court, [Off. Add.: D-73

Basement, Block-D, Panchsheel Enclave, New Delhi-110017; Mobile: 9818000210] as a Sole Arbitrator to adjudicate the disputes that have arisen between the parties in relation to the above Contract.

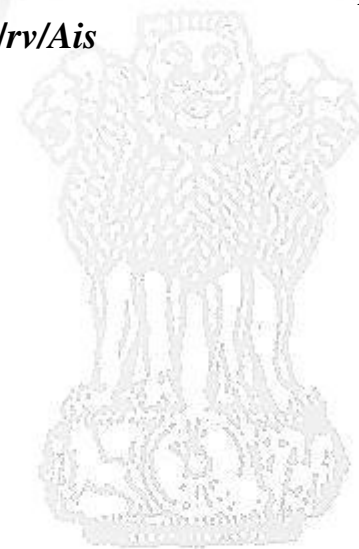
23. The learned Arbitrator shall give a disclosure under Section 12 of the Act before proceeding with the reference.

24. The fee of the learned Arbitrator shall be in accordance with Schedule IV of the Act.

25. The petition is allowed in the above terms.

NAVIN CHAWLA, J.

FEBRUARY 07, 2023/rv/Ais



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