

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

% **Date of Order : 20th February, 2023**

+ **ARB.P. 1436/2022**

M/S MANRAJ ENTERPRISES Petitioner

Through: Appearance not given

versus

UNION OF INDIA Respondent

Through: Mr. Balendu Shekhar, CGSC with
Mr. Krishna Chaitanya, Mr.
Sriansh Prakash and Mr. R. K.
Maurya, Advocates

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J (Oral)

1. The present petition has been filed by the petitioner under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “**the Act, 1996**”) seeking redressal of disputes arising between the parties qua the General Conditions of Contract.

2. Learned counsel appearing on behalf of the petitioner submits that the petitioner is a registered Partnership Firm that offers its numerous services (often linked to energy) under contract to various organisations, including Ministries and Departments of the Government of India.

3. It is submitted on behalf of the petitioner that the respondent invited tender for the execution of work named and styled as "OHE modification works in connection with (A) Removal of PSR-120 KMPH at Ballabhgarh (Delhi end) (B) Easing of turnouts at Tilak Bridge (C) Limited height subway at Km 68/3-4on ROK-ABO section of Delhi Division".

4. It is further submitted that the petitioner responded to the request for tender by submitting a bid for the project on 24th July, 2014 which was accepted by the respondent vide its letter of intent (LOI) No. 230-Elect/TRD/2011/1/(High Speed) dated 13th August, 2014, followed by a detailed acceptance letter dated 26th September, 2014, on behalf of the President of India. The job had to be finished by 12th August, 2015 which was twelve months from the date of the letter of acceptance and an amount of Rs. 1,96,60,213/-(Rupees One Crore Ninety Six Lakhs Sixty Thousand Two Hundred and Thirteen Only) was paid for executing the allotted work.

5. It is submitted that a formal contract was also executed between the petitioner and the respondent regarding the work in question, which among other things was governed by the General Conditions of the contract for the settlement of disputes by way of arbitration under clause 64 of the GCC 1999 as amended up to the date of invitation to tender.

6. It is submitted on behalf of the petitioner that along with the tender as EMD, which was kept as ISD, the petitioner also submitted the TDA No. 026218 dated 22nd July, 2014 issued by State Bank of Patiala, Okhla Industrial Area, Phase - I, New Delhi-110020 for an amount of Rs.

2,42,500.00/-(Rupees Two Lakhs Forty Two Thousand Five Hundred only). Additionally, as requested by the respondent, the petitioner also submitted the Performance Bank Guarantee (PBG) bearing No. BG-03/2014-15 dated 8th September, 2014 for an amount of Rs. 9,83,020/- (Rupees Nine Lakhs Eighty Three Thousand and Twenty only).

7. It is submitted on behalf of the petitioner that as soon as the job was granted, the petitioner began making all the necessary arrangements to ensure that the work would be executed and completed within the allotted time frame. In a letter dated 17th February, 2015, the petitioner organised and submitted the materials for the execution of the works for inspection and approval. In accordance with the inspection notice dated 10th March, 2015, the materials were examined and deemed suitable for delivery to the site(s).

8. It is further submitted that around 25% of the work that was allotted was finished within the stipulated time, but the remaining work could not be done since there was no available location that could be used. In light of above, the petitioner requested an extension of time for the completion of the remaining work on the availability of the remaining site vide letter dated 1st October, 2015, after the stipulated time had passed. It is further submitted that construction was concluded on one of the sites at Tilak Bridge within the allotted time. The petitioner was notified in 2016 that the work was not necessary in the ROK-ABO Section of Delhi and furthermore, Ballabhgarh's location was not made accessible. Unfortunately, despite the extra time, the task could not be completed since the respondent was responsible for the site's

unavailability. Thus, the petitioner vide letter dated 3rd February, 2017 requested an extension of time up to 30th June, 2017 from the Engineering Department of the respondent to complete the remaining work on ESP finalisation. It is submitted that the respondent would not have processed running payment for the work already completed but unpaid if the DOC extension hadn't been granted.

9. It is submitted on behalf of the petitioner that an extension of time to 30th June, 2017, was notified vide letter dated 16th February, 2017 issued by the respondent. Unfortunately, the remaining worksite was not made accessible until October 2017. However, because the extra time ran out on 30th June, 2017, and the Performance Bank Guarantee's validity also ran out, the petitioner had no choice but to inform the respondent of the same through letter dated 23rd October, 2017, asking them to extend the time again due to departmental delays and failures. The petitioner then sent letters on 20th November, 2017, and 18th January, 2018, demanding an expedited release of the balance site.

10. It is further submitted that even in the end of 2017, no decision had been made on the execution of the remaining works at Ballabhgarh despite the fact that the delay and site damage were becoming intolerable.

11. It is submitted on behalf of the petitioner that since there was an uncertainty regarding the availability of the balance site, the petitioner asked the respondent vide letter dated 18th April, 2018, to resolve any disputes with respect to non-availability of the site.

12. It is further submitted that since neither the contract was concluded nor was there any response, the petitioner was constrained to invoke the arbitration clause as provided under the GCC.

13. It is submitted that the bank guarantees also ran out on 19th April, 2018, in the meanwhile. The petitioner then asked the respondent vide letter dated 18th May, 2018 to extend the completion date until 30th June, 2018 so that it could claim the payment for the completed work and close the contract at that point of time.

14. It is submitted on behalf of the petitioner that due to the fact that neither the site was made available nor the contract was terminated until July 2018, the petitioner, vide letter dated 18th July, 2018, presented a final bill for payment of Rs. 10,06,696.65 for work completed but unpaid and asked that the contract be terminated.

15. It is submitted on behalf of the petitioner that instead of concluding the contract, the respondent vide letter dated 4th September, 2018, provided a copy of a letter bearing no. SSE/TRD/Spl/NDLS alleging errors in the petitioner's bill and that there were still works that remained to be executed. The petitioner vide letter dated 10th October, 2018, objected and contested the same, asking the respondent to disburse the funds.

16. It is further submitted that the petitioner once again requested for the contract closure and payment of the final bill with release of security and PBG vide letter dated 19th October, 2018.

17. It is submitted on behalf of the petitioner that the petitioner invoked the arbitration clause i.e. Clause 64 of the GCC vide letter dated 7th May, 2019 and requested that the competent authority i.e. the General Manager of Northern Railway may appoint an arbitrator to adjudicate the petitioner's claim. The petitioner reaffirmed its request for the appointment of an arbitrator vide letter dated 5th July, 2019.

18. It is claimed that the office of the Competent Authority issued letters dated 1st July, 2019 and 16th July, 2019 instructing the petitioner to fill out certain forms and permission letters and resubmit their application for appointment of an arbitrator with forms in response to the petitioner's request.

19. It is submitted on behalf of the petitioner that vide letter dated 9th August, 2019, the respondent provided the petitioner with the names of four of its retired officers for the position of nominee arbitrator.

20. It is submitted that due to the competent authority's failure to follow the procedure outlined in clause 64 of the GCC, Section 12(5) of the Act, 1996, Schedule V to VII of the Act, 1996, as amended to the present. Since, the arbitrator has not yet been appointed, the competent authority has forfeited and renounced its authority to establish the arbitral tribunal.

21. Learned counsel appearing on behalf of the respondent submitted that the main contention of the instant petition is that if any Arbitrator shall be appointed from the panel proposed by the respondent, it will be contrary to the statutory provision i.e., Section 12(5) read with seventh

schedule of the Act, 1996.

22. Learned counsel for the respondent vehemently submitted that the position of law is no more *res integra* with respect to appointment of arbitrator from the panel since the same has been settled by the Hon'ble Supreme Court in the case of ***Central Organisation for Railway Electrification vs. ECI-SPIC-SMO-MCML (JV) a Joint Venture Company*** reported as (2020) 14 SCC 712, wherein it has been held that if any Arbitrator is appointed from the panel, it shall not be the violation of the Section 12(5) of the Act, 1996.

23. At this juncture, learned counsel appearing on behalf of the petitioner submitted that in the other cases, the respondent has agreed to appoint the independent Sole Arbitrator to adjudicate the arbitral dispute and the petitioner has referred the Order dated 6th February, 2023 passed by the Coordinate bench of this Court in the case of ***M/s. Manraj Enterprises vs. Union of India*** bearing no. **ARB. P. 1325/2022**.

24. Heard learned counsel for the parties and perused the records.

25. It is an admitted fact that there are provisions under the contract for invoking arbitration and the petitioner has duly invoked the Arbitration clause by way of issuing notice under Section 21 of the Act, 1996. The respondent has agreed that there are arbitral disputes between the parties which may be adjudicated by learned Arbitral Tribunal. The main objection raised on behalf of both the parties is with respect to the name of the independent arbitrator.

26. Without entering into the merits of the case and law, this Court is inclined to allow the instant petition.

27. As agreed on behalf of both the parties, this Court finds it evident

to appoint a sole arbitrator to adjudicate the disputes between the parties.
Hence, the following order:

ORDER

- (i) Mr. Shyam Sharma, Advocate is appointed as a sole arbitrator to adjudicate the disputes between the parties which have arisen under the General Conditions of Contract;
- (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 (DIAC) (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 10 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.

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

Shyam Sharma, Advocate
Chamber No. - 287, Lawyer's Chamber Block - II

Delhi High Court, New Delhi – 110003

Ph. No. - +91-9810153965

E-mail Id – law.shyam2@gmail.com

29. The petition is disposed of in the aforesaid terms along with pending applications, if any.

30. The order be uploaded on the website forthwith.

FEBRUARY 20, 2023

gs/ug

CHANDRA DHARI SINGH, J

Click here to check corrigendum, if any