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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

ARB-327-2023

Date of decision:-09.09.2024

M/s A.S. Enterprises

...Petitioner

Versus

Municipal Corporation Gurugram through the Commissioner,
Gurugram, Haryana

...Respondent

CORAM : HON'BLE MR. JUSTICE SUVIR SEHGAL

Present : Mr.Aman Bansal, Advocate
for the petitioner.

Mr.Prateek Mahajan, Advocate with
Mr.Mayank Vashishth, Advocate
for the respondent.

SUVIR SEHGAL, J.(ORAL)

1. By way of instant petition filed under Section 11 (6) of the Arbitration and Conciliation Act, 1996 (for short "the Act"), petitioner has approached this Court for appointment of an Arbitrator to adjudicate the dispute between the parties.

2. Counsel for the petitioner submits that petitioner was allotted work of construction of Multi Level Car Parking at Kaman Sarai, Gurugram vide letter dated 09.09.2019, Annexure P2. He submits that Clause 24 and 25 of the General Conditions of the Contract (GCC), Annexure P1, provide for mechanism for resolution of any dispute



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between the parties. Counsel submits that due to the failure on the part of the respondent to hand over the site, a dispute arose and by letter dated 11.04.2022, Annexure P16, addressed to the respondent, petitioner sought compensation and by a subsequent letter dated 27.03.2023, Annexure P21, he issued a show-cause notice for termination of the contract besides raising claims. Counsel asserts that by legal notice dated 17.06.2023, Annexure P22, petitioner invoked the arbitration clause. It is his categoric case that none of these letters have been attended to by the respondent.

3. Upon notice by this Court, a short reply has been filed by the respondent contesting the petition, wherein it has been submitted that the clear site was handed over to the petitioner by communication dated 05.04.2022, Annexure P15, who failed to start the construction work. By referring to Clause 24.3, counsel for the respondent submits that the petitioner has failed to exhaust the pre-reference mechanism before invoking the arbitration clause. He has also invited the attention to Clause 25.1 to submit that it is mandatory for the petitioner to deposit a claim fee before the commencement of the arbitral proceedings.

4. I have heard counsel for the parties and considered their respective submissions.

5. The relevant extract of Clause 24 of GCC, which lays down the Dispute Redressal System deserves to be noticed and is reproduced hereunder:-

“24.1 In case of contract (s) of value lesser than Rs.2 cr., the agency will make an appeal to the Appellant Authority i.e.



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concerned Superintending Engineer who will decide the issue within 90 days. In case of dissatisfaction on the part of the contractor, he can go to Court after the decision of this appeal or after 90 days in case of no decision from the Appellant Authority.

24.2. In case of contract(s) of value more than Rs.2.00 cr. and less than Rs.10.00 cr., the agency will make an appeal to the Appellant Authority i.e. concerned Superintending Engineer who will decide the issue within 90 days. If the contractor is not satisfied with the Appeal, he can go for Arbitration. Adjudication of the dispute shall be done by Sole Arbitrator to be appointed by the Govt. from the list of Arbitrators approved by the Govt.

24.3 For disputes relating to contract (s) of value higher than Rs.10 cr., the agency may first appeal to the concerned Superintending Engineer. In case the contractor is not satisfied with the appeal he can go for the Arbitration. The arbitration shall be done by three members tribunal with composition as below.

24.4 The composition of the Tribunal will be:

(i) One official member, Chairman of the Tribunal, not below the rank of Chief Engineer (Serving) of the State Govt./State Govt. Undertakings to be appointed by Govt.

(ii) One official member not below the rank of Superintending Engineer (Serving/retired) of Municipal Corporation of Gurugram to be appointed by Govt.

(iii) One non-official member who will be technical expert



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not below the rank of Superintending Engineer (Serving/retired) of Municipal Corporation of Gurugram selected by the Contractor from a panel of three persons given to him by the Employer.”

6. Undisputedly, the contract awarded to the petitioner is of the value of more than Rs.10 crores, therefore Clause 24.3 comes into operation. When all the above three clauses are read conjointly it is clear that in the first two clauses, it is mandatory for the claimant to file an appeal before the Superintending Engineer as the word used in the first two clauses is that the agency “will” make an appeal to the Appellate Authority i.e. the Superintending Engineer. However, in Clause 24.3, it has been provided that the agency “may” first appeal to the concerned Superintending Engineer. Moreover in Clause 24.1 and 24.2, it has been laid down that the concerned Appellate Authority will decide the appeal within a period of 90 days, however, there is no such stipulation in Clause 24.3. It is, therefore, evident from the above discussion that the filing of the appeal under Clause 24.3 is not mandatory and it was left to the discretion of the contractor. This Court is, therefore of the view that the non-filing of the appeal by the petitioner would not bar the invocation of the arbitration clause.

7. Yet another submission made by counsel for the petitioner deserves to be accepted. Clause 24.4, reproduced above, provides the composition of the Tribunal, which includes the Serving/Retired officials of the Government and the respondent – Corporation. The appointment



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of such persons as members of the Arbitral Tribunal is hit by Section 12 (5) read with Seventh Schedule of the Act and they are ineligible to be appointed as an Arbitrators. Insofar as the pre-deposit is concerned, the same shall be determined by the Arbitral Tribunal.

8. For the foregoing reasons, petition is allowed. Mr. Chief Justice (Retd.) Ajai Lamba, a former Judge of this Court, r/o House No. 575, Sector 16-D, Chandigarh, 2nd Address: E-703, Lagoon Apartments, Ambience Island, N.H.8, Gurugram 122010, M: 7080888888, is nominated as an Arbitrator to adjudicate the dispute between the parties, subject to compliance of statutory requirements.

9. Parties are directed to appear before the learned Arbitrator on the date, time and place to be fixed and communicated by the learned Arbitrator at his convenience.

10. Parties will be at liberty to raise all the pleas/defences before the Arbitrator.

11. Needless to mention that all the questions arising between the parties in this matter will remain open for determination in the arbitration proceedings, and any observation made hereinabove will not be binding on the learned Arbitrator.

12. A request letter be sent to Mr. Chief Justice (Retd.) Ajai Lamba alongwith a copy of this order.

(SUVIR SEHGAL)
JUDGE

09.09.2024

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Whether reasoned/speaking : Yes/No

Whether reportable : Yes/No