



2024:DHC:5766



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

+ **ARB.P. 159/2024**

M/S AJAY MACHINE TOOLSPetitioner

Through: **Mr. Samjoy Bhaumik, Adv.**

versus

NATIONAL SECURITY GUARD NEW DELHI

.....Respondent

Through: **Mr. Raj Kumar, CGSC**

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

ORDER (ORAL)

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02.08.2024

1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act 1996¹ for reference of the dispute between the parties to arbitration.

2. The dispute arises in the context of an agreement between the petitioner and respondent which is bound by the General Conditions of Contract (GCC) for Central Public Works Department Works 2014 (2014 GCC), which envisages resolution of dispute by arbitration.

3. The relevant arbitration clause reads thus:

“Clause 25 - Settlement of Disputes & Arbitration

Except where otherwise provided in the contract, all questions and disputes relating to the meaning of the specifications, design, drawings and instructions here-in before mentioned and as to the quality of workmanship or materials used on the work or as to any

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the 1996 Act” hereinafter

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other question, claim, right, matter or thing whatsoever in any way arising out of or relating to the contract, designs, drawings, specifications, estimates, instructions, orders or these conditions or otherwise concerning the works or the execution or failure to execute the same whether arising during the progress of the work or after the cancellation, termination, completion or abandonment thereof shall be dealt with as mentioned hereinafter:

- (i) If the contractor considers any work demanded of him to be outside the requirements of the contract, or disputes any drawings, record or decision given in writing by the Engineer-in-Charge or if the Engineer in Charge on any matter in connection with or arising out of the contract or carrying out of the work, to be unacceptable and is disputed, such party shall promptly within 15 days request the Superintending Engineer or shall give his written instructions or decision within a period of one month from the receipt of the contractors letter.

If the Superintending Engineer fails to give his instructions or decision in writing within the aforesaid period or if the contractor is dissatisfied with the instructions or decision of the Superintending Engineer decision, the contractor may, within 15 days of the receipt of Superintending Engineer's decision, appeal 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 shall give his decision within 30 days of receipt of contractor's appeal. If the contractor is dissatisfied with the decision of the Chief Engineer, the contractor may within 30 days from the receipt of the Chief Engineer decision, appeal before the Dispute Redressal Committee (DRC) alongwith a list of disputes by the Chief Engineer. The Dispute Redressal Committee (DRC) shall give his decision within a period of 90 days from the receipt of contractor's appeal. The constitution of Dispute Redressal Committee (DRC) shall be as indicated in Schedule 'F'. If the Dispute Redressal Committee (DRC) fails to give its decision within the afore said period or any party is dissatisfied with the decision of Dispute Redressal Committee (DRC), the neither party may within a period of 30 days from the receipt of the decision of Dispute Redressal Committee (DRC), give notice to the Chief Engineer for appointment of Arbitrator on prescribed proforma as per Appendix xv, failing which the said decision shall be final binding and conclusive and not referable to adjudication by the Arbitrator.

It is a term of contract that each party invoking arbitration must exhaust the aforesaid mechanism of settlement of claims/disputes prior to invoking arbitration.

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(ii) Except where the decision has become final, binding and conclusive in terms of Sub Para (i) above, disputes or difference shall be referred for adjudication through arbitration by a sole arbitrator appointed by the Chief Engineer, CPWD, in charge of the work or if there be no Chief Engineer, the Additional Director General of the concerned region of CPWD or if there be no Additional Director General, the Director General, CPWD, If the arbitrator so appointed is unable or unwilling to act or resigns his appointment or vacates his office due to any reason whatsoever, another sole arbitrator shall be appointed in the manner aforesaid. Such person shall be entitled to proceed with the reference from the stage at which it was left by his predecessor.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Chief Engineer of the appeal.

It is also a term of this contract that no person, other than a person appointed by such Chief Engineer CPWD or Additional Director General or Director General, CPWD, as aforesaid, should act as arbitrator and if for any reason that is not possible, the matter shall not be referred to arbitration at all.

It is also a term of this contract that if the contractor does not make any demand for appointment of arbitrator in respect of any claims in writing as aforesaid within 120 days of receiving the intimation from the Engineer-in-charge that the final bill is ready for payment, the claim of the contractor shall be deemed to have been waived and absolutely barred and the Government shall be discharged and released of all liabilities under the contract in respect of these claims.

The arbitration shall be conducted in accordance with the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) or any statutory modifications or re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

It is also a term of this contract that the arbitrator shall adjudicate on only such disputes as are referred to him by the appointing authority and give separate award against each dispute and claim referred to him and in all cases where the total amount of the claims by any party exceeds Rs. 1,00,000/-, the arbitrator shall give reasons for the award.

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It is also a term of the contract that if any fees are payable to the arbitrator, these shall be paid equally by both the parties.

It is also a term of the contract that the arbitrator shall be deemed to have entered on reference on the date he issues notice to both the parties calling them to submit their statement of claims and counter statement of claims. The venue of the arbitration shall be such place as may be fixed by the arbitrator in his sole discretion. The fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid half and half by each of the parties. The cost of the reference and of the award (including the fees, if any, of the arbitrator) shall be in the discretion of the arbitrator who may direct to any by whom and in what manner, such costs or any part thereof shall be paid and fix or settle the amount of costs to be so paid.”

4. In accordance with the pre-arbitral protocol envisaged by the arbitration clause, the petitioner wrote to the SQN Cdr. (Engg.) of the respondent on 13 April 2023. The claims were rejected by the SQN Cdr on 8 May 2023. The petitioner thereafter addressed a representation of the Director (Engg) on 8 May 2023 which was rejected on 12 May 2024.

5. On 13 July 2023, the petitioner requested for the constitution of Dispute Resolution Committee (DRC) to look into the dispute.

6. As no DRC was constituted, a Section 21 notice was addressed by the petitioner to the respondent on 23 November 2023. To this, there was no representation.

7. The petitioner has therefore approached this Court under Section 11 (6) of the 1996 Act for appointment of an arbitrator to arbitrate on the dispute between the parties.

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8. The respondent has filed a reply to the present petition.
9. I have learned Counsel for the petitioner at some length.
10. The only defence of the respondent to the petitioner's request for appointing an arbitrator, as contained in the reply filed to this petition and articulated in court by Mr. Raj Kumar, is that the claims of the petitioner are barred by time and that they are not maintainable in term of the agreement executed between the parties for which reason the respondent relies on Clause 25(ii) of the GCC.
11. All other grounds of challenge to the present petition, as contained in the reply filed by the respondent, pivot entirely around the merit of the dispute.
12. The Supreme Court has, by its recent decision in ***SBI General Insurance Co Ltd v. Krish Spinning²***, considerably limited the aspect which a Section 11 Court can examine.
13. Paras 110 to 113 of the decision in ***SBI General Insurance Co Ltd*** may be reproduced, to advantage, as under:

110. The scope of examination under Section 11(6-A) is confined to the existence of an arbitration agreement on the basis of Section 7. The examination of validity of the arbitration agreement is also limited to the requirement of formal validity such as the requirement that the agreement should be in writing.

111. The use of the term 'examination' under Section 11(6-A) as distinguished from the use of the term 'rule' under Section 16



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implies that the scope of enquiry under section 11(6-A) is limited to a *prima facie* scrutiny of the existence of the arbitration agreement, and does not include a contested or laborious enquiry, which is left for the arbitral tribunal to 'rule' under Section 16. The *prima facie* view on existence of the arbitration agreement taken by the referral court does not bind either the arbitral tribunal or the court enforcing the arbitral award.

112. The aforesaid approach serves a two-fold purpose - firstly, it allows the referral court to weed out non-existent arbitration agreements, and secondly, it protects the jurisdictional competence of the arbitral tribunal to rule on the issue of existence of the arbitration agreement in depth.

113. Referring to the Statement of Objects and Reasons of the Arbitration and Conciliation (Amendment) Act, 2015, it was observed in *In Re : Interplay* (supra) that the High Court and the Supreme Court at the stage of appointment of arbitrator shall examine the existence of a *prima facie* arbitration agreement and not any other issues. The relevant observations are extracted hereinbelow:

“209. The above extract indicates that the Supreme Court or High Court at the stage of the appointment of an arbitrator shall “examine the existence of a prima facie arbitration agreement and not other issues”. These other issues not only pertain to the validity of the arbitration agreement, but also include any other issues which are a consequence of unnecessary judicial interference in the arbitration proceedings. Accordingly, the “other issues” also include examination and impounding of an unstamped instrument by the referral court at the Section 8 or Section 11 stage. The process of examination, impounding, and dealing with an unstamped instrument under the Stamp Act is not a timebound process, and therefore does not align with the stated goal of the Arbitration Act to ensure expeditious and time-bound appointment of arbitrators. [...]”

(Emphasis supplied)

14. Certain specific directives, regarding the scope of examination by a Section 11 (6) Court, are forthcoming from the afore-extracted decision from *SBI General Insurance Co Ltd* They may be thus enumerated:

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(i) Classically, the scope of examination by a Section 11(6) Court is restricted to the aspect of whether an arbitration agreement is in existence between the parties. Even in this, the Court is required only to satisfy itself on a *prima facie* scrutiny that an arbitration agreement exists. No contested or laborious inquiry is permissible. Any such inquiry has to be relegated to the learned Arbitral Tribunal.

(ii) The issue of whether the claim amount stands discharged by accord and satisfaction cannot be examined by a Section 11 (6) Court. This has to be left entirely to adjudication by the Arbitral Tribunal.

(iii) The earlier test enunciated in ***SBI General Insurance Co Ltd*** predicated on the “eye of the needle” and “ex facie meritless” concepts are not in conformity with the modern principles of arbitration or the necessity of maintaining arbitral autonomy.

(iv) A plea of *ex facie* frivolity or dishonesty in the litigation is also an aspect which has to be seen only by the arbitral tribunal.

(v) Insofar as limitation is concerned, the Court can only examine whether a Section 11(6) application has been filed within three years of the notice invoking arbitration issued under Section 21 of the 1996 Act. A plea that the claims which the petitioner seeks refer to arbitration are beyond time cannot be

examined by a Section 11(6) Court that, too, has to be left for the

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arbitral tribunal.

15. Even while examining whether the Section 11(6) application has been filed in time, reckoned from the date of the Section 21 notice, the Court would only view the matter *prima facie*, and not embark on any detailed inquiry.

16. In that view of the matter, the grounds urged by Mr. Raj Kumar and contained in the reply filed by way of response to this petition are beyond the scope of examination by this Court under Section 11 (6) of the 1996 Act.

17. There is no dispute about the existence of an arbitration agreement or the fact that the parties are signatories thereof.

18. As the parties having not been able to arrive at a consensus regarding arbitration, the Court has necessarily to exercise its jurisdiction under Section 11(6) of the 1996 Act.

19. As requested by learned Counsel, the dispute is referred to the DIAC which shall appoint a suitable arbitrator to arbitrate on the dispute.

20. The arbitration shall be conducted in accordance with the rules & regulations of the DIAC. The arbitrator shall be entitled to fees as per the Schedule of Fees maintained by the DIAC.

21. The arbitrator would also file requisite disclosure under Section



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12(2) of the 1996 Act within a week of entering on reference.

22. The petition stands disposed of in the aforesaid terms.

C. HARI SHANKAR, J.

AUGUST 2, 2024

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Click here to check corrigendum, if any

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