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

+ ARB.P. 165/2024

SHRI SURINDRA KUMAR

.....Petitioner

Through: Mr. Sanjoy Bhaumik, Adv.

versus

CENTRAL PUBLIC WORKS DEPARTMENTRespondent

Through: Mr. Rahul Sharma, (CG) Sr.
PSC**CORAM:****HON'BLE MR. JUSTICE C. HARI SHANKAR****JUDGMENT (ORAL)**

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23.09.2024

1. This is a petition under Section 11(6)¹ of the Arbitration and Conciliation Act, 1996², seeking reference of the disputes between the parties to arbitration.

2. The respondent had awarded a contract to the petitioner for upgradation of Communication Control Room for Installation of New Digital Radio Trunking System at 1 Safdarjung Lane, New Delhi. The

¹ (6) Where, under an appointment procedure agreed upon by the parties,—
(a) a party fails to act as required under that procedure; or
(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or
(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be] to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

² “the 1996 Act”, hereinafter



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agreement was governed by the General Conditions of Contract³ (GCC) 2020 applicable to maintenance works. Clause 25 of the agreement envisages settlement of disputes by arbitration. The relevant portion thereof may be reproduced thus:

“Clause 25

Except where otherwise provided in the contract, all questions and disputes relating to meaning of the specifications, design, drawings and instructions here-in before mention and as to the quality of workmanship or materials used on the work or as to any 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 considers any act or decision of the contractor 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 of the arising of the disputes request the Chief Engineer/ CPM, or where there is no Chief Engineer/CPM, the Additional Director General/Special Director General (CE/ADG/SDG) who shall refer the disputes to Dispute Redressal Committee (DRC) within 15 days along with a list of disputes with amounts claimed if any in respect of each such dispute. The Dispute Redressal Committee (DRC) give its decision within a period of 60 days extendable by 30 days by consent of both the parties from the receipt of reference from CE/CPM/ADG/SDG. The constitution of Dispute Redressal Committee (DRC) shall be as indicated in Schedule 'F'. Provided that no party shall be represented before the Dispute Redressal Committee by an advocate/legal counsel etc.

The DRC will submit its decision to the concerned

³ GCC



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ADG/SDG for acceptance, ADG/SDG in a time limit of 30 days from receipt of DRC decision will convey acceptance or otherwise on the said decision if the Dispute Redressal Committee (DRC) fails to give its decision within the aforesaid period or the ADG/SDG fails to give his acceptance in the aforesaid time limit or any party is dissatisfied with the decision of Dispute Redressal Committee (DRC) ADG/SDG then either party may within a period of 30 days from the receipt of the decision of Dispute Redressal Committee (DRC), ADG/SDG or on expiry of aforesaid the time limits available to DRC/ADG/SDG may give notice to the Chief Engineer/CPM, CPWD, in charge of the work or if there be no Chief Engineer/ CPM, the Additional Director General/Special Director General of the concerned region of CPWD or if there be no Additional Director General/ Special Director General, the Director General, CPWD for appointment of arbitrator on prescribed proforma as per Appendix XVII under intimation to the other party.

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.”

3. Mr. Rahul Sharma, learned Senior Panel Standing Counsel for the respondent submits that the present petition is premature as the petitioner has not exhausted the pre-arbitral protocol envisaged by Clause 25(i) of the GCC.

4. Mr. Bhaumik, learned Counsel for the petitioner contests this submission. He submits that the sequence of relevant communications exchanged between his client and the respondent are as under:

(i) On 10 April 2023, the petitioner wrote to the Executive Engineer, CPWD, raising its claims.

(ii) The Executive Engineer replied on 25 April 2023,



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following which the petitioner again wrote to the Executive Engineer, raising its claims on 1 May 2023.

(iii) On 23 May 2023, the Executive Engineer rejected the petitioner's claims.

(iv) The petitioner thereafter wrote to the Chief Engineer on 29 May 2023 as there was no intervening post of Superintendent Engineer in the CPWD.

(v) The Chief Engineer rejected the petitioner's representation on 19 June 2023.

(vi) The petitioner then wrote to the Chief Engineer on 10 August 2023 seeking constitution of a DRC to examine the petitioner's claims.

(vii) This was followed by a communication dated 26 September 2023, in which the petitioner specified the disputes of which he sought redressal via the DRC.

5. The matter remained pending with the DRC. The respondent constituted the DRC on 4 October 2023, within the period of 15 days available under Clause 25(i).

6. No decision was taken by the DRC within 60 days of constitution of the DRC and there was no consensus *ad idem* between



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the parties for extending the time by another 30 days.

7. Mr. Rahul Sharma seeks to point out that, prior to the expiry of 60 days, the petitioner had written to the Chief Engineer on 30 November 2023 stating that the petitioner was approaching this Court for appointment of an Arbitrator. As such, he submits that, even without waiting for 60 days from the date when the DRC was constituted, the petitioner had made known its intention not to wait for the decision of the DRC and to seek arbitration of the disputes.

8. Be that as it may, the letter dated 30 November 2023 clearly does not constitute a notice seeking reference of the disputes to arbitration as envisaged by Section 21⁴ of the 1996 Act. That notice was issued for the first time on 26 December 2023, after 60 days from the date of constitution of the DRC had expired.

9. Inasmuch as the petitioner had waited for 60 days from the date of constitution of the DRC, before issuing the Section 21 notice on 26 December 2023, and there was no consensus *ad idem* between the parties for extending the period of 60 days by a further period of 30 days, the notice under Section 21 cannot be treated to have been issued prematurely or irregularly.

10. As the respondent did not reply to the aforesaid notice dated 26 December 2023 of the petitioner, the petitioner has approached this

⁴ 21. **Commencement of arbitral proceedings.** – Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.



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Court on 2 February 2024 under Section 11(6) of the 1996 Act.

11. After the petitioner had approached this Court, the respondent addressed two communications to the petitioner, in January 2024, requiring the petitioner to attend the meeting of the DRC.

12. Thereafter, on 9 February 2024 and 16 February 2024, the respondent wrote to the petitioner calling on the petitioner to submit a proper application in terms of Appendix XVII read with Clause 25 of the GCC.

13. To my mind, all requisite ingredients, as would entitle the petitioner to seek reference of the disputes to arbitration stands fulfilled. The petitioner has completely exhausted the envisaged pre-arbitral protocol. The DRC, which was constituted on 4 October 2023, failed to render any decision on the petitioner's representation for a period of 60 days. That period of 60 days was extendable by a further period of 30 days only by consensus between the parties. There was admittedly no such consensus for extending the period of 60 days within which the DRC was required to render its decision. The DRC, therefore, became *functus officio* on 4 December 2023. The petitioner was, therefore, well within his rights in invoking arbitration on 23 December 2023. Thereafter, there was no justification whatsoever for the respondent to have again called upon the petitioner in January 2024 to attend the meeting of the DRC, as the jurisdiction of the DRC to look into the matter expired on 4 December 2023.



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14. The only meaningful communication thereafter, from the respondent to the petitioner, was 9 February 2023 and 16 February 2023, whereby the respondent called upon the petitioner to submit an application in terms of Appendix XVII to the GCC, as envisaged by Clause 25(i). Appendix XVII specifically applies where the dispute has to be referred to arbitration. By calling on the petitioner to submit the application in Appendix XVII, the respondent has candidly acknowledged the petitioner's right to refer the disputes to arbitration.

15. Though Mr. Rahul Sharma has emphatically submitted that the petitioner was necessarily required to submit the request for appointment of an arbitrator in Appendix XVII to the GCC and that, not having done so, he cannot approach this Court, I am not inclined to agree with the submission. The requirement of submitting an application under Appendix XVII is, at the highest, a formality. By calling upon the petitioner to submit the application in Appendix XVII, the respondent in fact acknowledged the petitioner's entitlement to have the disputes referred to arbitration. The petitioner cannot be non-suited at this stage merely because he had not submitted the request for appointment of the Arbitrator in Appendix XVII and had instant issued a Section 21 notice on 26 December 2023.

16. More importantly, if the requirement of submitting the request for appointment of Arbitrator in Appendix XVII was so sacred, there was no reason why the respondent did not communicate the said requirement to the petitioner within a reasonable time of 26 December 2023, when the petitioner issued the Section 21 notice.



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17. Mr. Rahul Sharma also sought to submit that the letter dated 30 November 2023 issued by the petitioner to the respondent evidenced the petitioner's lack of intent to have the disputes resolved by the DRC. This submission is completely unacceptable. The DRC was constituted on 4 October 2023. There is no explanation why the DRC took no decision on the petitioner's application till four days prior to the expiry of two months. The letter dated 30 November 2023 was issued four days prior to the expiry of the mandate of the DRC on 4 December 2023. Besides, the communication merely evinces the intent of the petitioner to seek recourse to arbitration, as the DRC had not taken any decision on the petitioner's claims. There is nothing irregular, whatsoever, in the said communication.

18. All requisite criteria, as would justify exercise of jurisdiction by this Court referring the dispute to arbitration, within the meaning of the judgment of the Supreme Court in *SBI General Insurance Co Ltd v Krish Spinning*⁵ stand satisfied.

19. Accordingly, this court appoints Mr. Sameer Sharma, Advocate (Tel: 9213857759) as the arbitrator to arbitrate on the disputes between the parties.

20. The learned arbitrator shall be entitled to charge fees as per the Fourth schedule of the 1996 Act.

⁵ 2024 SCC OnLine SC 1754



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21. The learned Arbitrator is also requested to file requisite disclosure under Section 12(2) of the 1996 Act prior to entering on the reference.

22. All questions of fact and law remain open to be urged before the Arbitral Tribunal.

23. The petition stands allowed in the aforesaid terms.

C.HARI SHANKAR, J

SEPTEMBER 23, 2024/aky

Click here to check corrigendum, if any