



\$~3

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

+ **ARB.P. 287/2024**

**MR ASHOK KUMAR PROPRIETOR OF
MS MC CONSTRUCTION CO**

.....Petitioner

Through: Mr Avinash Trivedi and Mr Rahul
Aggarwal, Advs.

versus

**DELHI TOURISM AND TRANSPORTATION DEVELOPMENT
CORPORATION LTD THROUGH ITS MANAGING DIRECTOR**

.....Respondent

Through: Ms Saloni Mahajan, Adv.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

ORDER

21.08.2024

%

1. This is a petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking appointment of an Arbitrator for adjudication of disputes between the parties.
2. On 09.05.2016, the petitioner was awarded the work of construction of SPS Building of Govt. Boys Senior Secondary School at village Jharoda Kalan, New Delhi-110072 vide Letter of Acceptance bearing No. DTTDC/Engg./EE(MB)/Jharoda Kalan/230”.
3. On furnishing of the Bank Guarantee guarantee vide FDR No. 195223 of Rs 32,00,000/-, a formal agreement bearing no. 07 /EE(MB)/DTTDC/Engg./2016-17 was also executed between the parties.
4. The Arbitration clause is Clause 25 of the General Conditions of Contract (GCC) which reads as under:-



“CLAUSE 25

Except where otherwise provided in the Contract all questions and disputes relating to the meaning of the specifications, design, drawings and instructions herein before mentioned 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 and drawings, record or decision given in writing by the Engineer-in-charge on any matter in connections with or arising out of the Contract or carrying out of the work, to be unacceptable, he shall promptly within 15 days request the Superintending Engineer in writing for written instructions or decision. Thereupon, the Superintending Engineer shall give his written instruction or decision within a period of one month from the receipt of the Contractor's 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, the Contractor may, within 15 days of the receipt of the 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 this 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) along with a list of disputes with amounts claimed in respect of each such dispute and giving reference to the rejection of his 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 'T'. If the Dispute Redressal Committee (DRC) fails to give his decision within the aforesaid period or any party is dissatisfied with the decision of Dispute Redressal Committee (DRC), then either 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 the term of contract that each party invoking arbitration must exhaust the aforesaid mechanism of settlement of claims/disputes prior to invoking arbitration.

(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, I&FC. If the arbitrator so appointed is unable or unwilling to act or resigns his appointment vacates his office due to any reason whatsoever, another sole arbitrator shall be appoint 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 amount 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, I&FC 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 Employer 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 reenactment thereof and the rules made there under and for the time being in force shall apply to the arbitration proceeding under this clause, except for cases falling under para 2(i) or (ii).

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.

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 the 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.”

5. The petitioner submitted its 10th and final bill on 18.07.2018 and certain payments were released. However, since the petitioner was of the view that the entire payment has not been made, the petitioner addressed a letter dated 03.12.2020 to the Chief Project Manager, Engineering Division seeking settlement of disputes. The said letter was replied on 07.01.2021 wherein the claims raised by the petitioner were rejected.

6. The petitioner again wrote a letter dated 08.01.2021 to the CEO of the



respondent department. Thereafter, petitioner wrote a letter dated 01.03.2021 to respondent department to constitute the Dispute Resolution Committee (DRC) to settle the disputes.

7. Petitioner on not receiving response to the above said letters, wrote a letter to the Chief Project Manager on 23.12.2022 invoking the arbitration clause seeking resolution of dispute by way of arbitration. Since disputes were not settled, the present petition was filed.

8. Ms Mahajan, learned counsel for the respondent has stated that the procedure as envisaged under Clause 25 of the GCC has not been followed by the petitioner. She also states that full and final settlement has also been accorded by the petitioner and hence there are no surviving disputes for adjudication.

9. The abovesaid objections of the respondent have already been dealt with by a Coordinate Bench of this Court in ***Ms Krishan Kumar & Sons v. Delhi Tourism And Transportation Development Corporation Ltd., 2024:DHC:3427***. The Coordinate Bench held that the whole purpose of a multi layer redressal mechanism is to ensure that the parties shall avail of all redressal mechanism before approaching competent Court of Law.

10. In the present case, except the first letter dated 03.12.2020 no other letters of the petitioner were answered. The respondent cannot be permitted to urge that the petitioner must follow the redressal mechanism and on the other hand choose to be oblivious to the letters written repeatedly by the petitioner. The whole purpose of the redressal mechanism is that in case there is any viable solution that could be found to settle the disputes, the same should be arrived at before approaching the Court.

11. Further, once the respondent chooses not to reply to any of the letters



of the petitioner, it is clear that the respondent is not interested in settlement talks.

12. Mr Trivedi, learned counsel for the petitioner states that the petitioner was under the impression that the Chief Project Manager and the Superintending Engineer is the same authority. Without prejudice to the same, he has already approached the Chief Engineer as well as the Managing Director which is the next higher authority of the Superintending Engineer and received no response.

13. The other objection with regard to the petitioner having given an undertaking that there are no amounts due and payable after receipt of final bill has also been dealt in *Ms Krishan Kumar & Sons (supra)* and more particularly in paras 18 to 21 which reads as under:

“18. The third ground agitated on behalf of the respondent is that a Final undertaking had been furnished by the petitioner stating that there were no disputes surviving. In view of the amounts that have been released under the Final Bill and the admission of the petitioner that no dispute survives, the Claims under the contract, cannot be now re-agitated.

19. In M/s Thermal Engineers & Insulators Pvt. Ltd. Vs. Delhi Tourism & Transportation Development Corporation Ltd. in Arb. Pet. No. 1033/2021 decided on 25th February, 2022, the Coordinate Bench while considering a similar objection in a Petition under Section 11(6) of the A&C Act, 1996, observed that even though an Undertaking of final payment had been received, the circumstances under which such undertaking was executed and whether the same could be considered as a complete discharge of the contractual obligation of the respondent absolving him from all the liabilities, is still a moot point open for adjudication.

20. Similar view has been expressed recently by the Coordinate Bench in the case of Makker Construction V/s Delhi Tourism & Transportation Ltd. in Arb. Pet.1263/2023 decided on 14.03.2024 wherein it was observed that merely because an Undertaking has been



furnished by the petitioner, the disputes would not become non Arbitrable. The circumstances in which such Undertaking was given and the effect thereof, would require adjudication.

21. Therefore, the objections taken on behalf of the respondent are not tenable as they are mixed questions of fact and law which can be determined only by recording evidence. The respondents are at liberty to agitate these grounds of challenge in their defense before the learned Arbitrator.”

14. The fact that the Certificate has been given and Undertaking was executed would not constitute a complete discharge. Further, I am in full agreement with the above observation that the circumstances under which the undertaking was given will require evidence and is left open for the Arbitrator to decide.

15. The argument that claim for escalation of cement and steel cannot be referred to arbitration is also without any merit. This is a question on the merits of the claim which the Arbitrator shall decide in view of the judgment of the Hon'ble Supreme Court in ***SBI General Insurance Co. Ltd. v. Krish Spinning, 2024 SCC OnLine SC 1754.***

16. For the said reasons, the petition is allowed with the following directions:-

- i) Mr. Sumeet Pushkarna, Adv. (Mobile No. 9811042847) is appointed as a Sole Arbitrator to adjudicate the disputes between the parties.
- ii) The arbitration will be held under the aegis of the Delhi International Arbitration Centre, Delhi High Court, Sher Shah Road, New Delhi (hereinafter, referred to as the 'DIAC'). The remuneration of the learned Arbitrator shall be in terms of the Fourth Schedule of the Arbitration & Conciliation Act, 1996.



- iii) The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.
- iv) It is made clear that all the rights and contentions of the parties, including as to the arbitrability of any of the claim, any other preliminary objection, as well as claims/counter-claims and merits of the dispute of either of the parties, are left open for adjudication by the learned arbitrator.
- v) The parties shall approach the learned Arbitrator within two weeks from today.

17. It is made clear that the observations made hereinabove are only for the purposes of deciding this petition and will have no effect on the final adjudication by the learned Arbitrator.

18. The petition is disposed of.

JASMEET SINGH, J

AUGUST 21, 2024

sr

[Click here to check corrigendum, if any](#)