



2024:DHC:6135



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

+ **ARB.P. 498/2024**

M/S BKSONS INFRASTRUCTURE PVT. LTDPetitioner

**Through: Mr. K.G. Gopalakrishnan and
Mr. Rakesh Kumar Singh, Advocates**

versus

**MANAGING DIRECTOR, NATIONAL HIGHWAYS
AND INFRASTRUCTURE DEVELOPMENT
CORPORATION**

.....Respondent

**Through: Mr. Balendu Shekhar, Mr. Raj
Kumar Maurya and Mr. Krishna Chaitanya,
Advocates**

**CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR**

JUDGMENT (ORAL)

12.08.2024

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1. This is a petition under Section 11(6) of the Arbitration and Conciliation Act, 1996¹ for appointment of an Arbitrator to arbitrate on the disputes between the parties.

2. The disputes arise in the context of an Engineering, Procurement and Construction (EPC) Contract dated 1 June 2020, executed between the petitioner and the respondent. The petitioner was contracted for transforming a two lane stretch of NH 117 to a 4 lane stretch.

Signature Not Verified¹ "the 1996 Act" hereinafter

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3. Article 26 of the contract between the parties envisages resolution of disputes by arbitration. Sub Article 26(1), 26(2) and 26.3(i) thereof, read thus :

“26.1 Dispute Resolution

(i) Any dispute, difference or controversy of whatever nature howsoever arising under or out of or in relation to this Agreement (including its interpretation) between the Parties, and so notified in writing by either Party to the other Party (the "Dispute") shall, in the first instance, be attempted to be resolved amicably in accordance with the conciliation procedure set forth in Clause 26.2.

(ii) The Parties agree to use their best efforts for resolving all Disputes arising under or in respect of this Agreement promptly, equitably and in good faith, and further agree to provide each other with reasonable access during normal business hours to all non-privileged records, information and data pertaining to any Dispute.

26.2 Conciliation

In the event of any Dispute between the Parties, either Party may call upon the Authority's Engineer, or such other person as the Parties may mutually agree upon (the "Conciliator") to mediate and assist the Parties in arriving at an amicable settlement thereof. Failing mediation by the Conciliator or without the intervention of the Conciliator, either Party may require such Dispute to be referred to the Chairman of the Authority and the Chairman of the Board of Directors of the Contractor for amicable settlement, and upon such reference, the said persons shall meet no later than 7 (seven) business days from the date of reference to discuss and attempt to amicably resolve the Dispute. If such meeting does not take place within the 30 (thirty) business day period or the Dispute is not amicably settled within 30 (thirty) days of the meeting or the Dispute is not resolved as evidenced by the signing of written terms of settlement within 30 (thirty) days of the notice in writing referred to in Clause 26.1.1 or such longer period as may be mutually agreed by the Parties, either Party may refer the Dispute to arbitration in accordance with the provisions of Clause 26.3 but before resorting to such arbitration, the parties agree to explore conciliation by the Conciliation Committees of Independent Experts set up by the Authority in accordance with the procedure decided by the panel of such experts and notified by the Authority on its website including its subsequent amendments. In the event of the conciliation proceedings being successful, the parties to the dispute would sign the written settlement agreement and the

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conciliators would authenticate the same. Such settlement agreement would then be binding on the parties in terms of Section 73 of the Arbitration Act. In case of failure of the conciliation process even at the level of the Conciliation Committee, either party may refer the Dispute to arbitration in accordance with the provisions of Clause 26.3.

26.3 Arbitration

(i) Any dispute which remains unresolved between the parties through the mechanisms available/ prescribed in the Agreement, irrespective of any claim value, which has not been agreed upon/reached settlement by the parties, will be referred to the Arbitral Tribunal as per the Arbitration and Conciliation Act.”

4. As disputes arose between the parties, the petitioner wrote to the Managing Director of the respondent on 2 January 2023 submitting that as the Engineer of the respondent had already communicated, in writing, disagreeing with the petitioner's claim, referring the matter to the Authority Engineer (AE) would be futile. The Managing Director of the respondent was therefore called upon to appoint a Conciliator to look into the matter and seek to resolve the disputes. This was followed by letter dated 8 June 2023 reiterating the request for appointment of a Conciliator and 25 July 2023, in which the petitioner suggested the names of three experts, of which the respondent was requested to choose one as the Conciliator to settle the disputes.

5. On the respondent remaining silent, the petitioner approached the Chairman of the respondent by way of letter dated 18 November 2023, praying that, in accordance with Clause 26.2 of the contract, a mutual meeting between the petitioner and the respondents be convened within seven days so that the matter could be resolved. The meeting took place on 27 December 2023. However, the petitioner

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was informed by the respondent *vide* letter dated 11 January 2024 that the petitioner's claims were rejected.

6. The petitioner thereupon proceeded to issue a notice to the respondent under Section 21 of the 1996 Act on 11 January 2024, seeking reference of the disputes to arbitration.

7. The respondent replied on 5 February 2024, requiring the petitioner to approach the Conciliation Committee of Independent Experts constituted by the respondent in terms of Clause 26.2.

8. The petitioner has, instead of doing so, approached this Court by means of the present petition under Section 11(6) of the 1996 Act, seeking resolution of the disputes by arbitration.

9. Mr. Balendu Shekhar, learned counsel for the respondent, submits that the present petition is not maintainable as the petitioner has not exhausted the mandatory pre-arbitral protocol contained in Clause 26.2 read with Clause 26.1 of the contract. He submits that, once the claims of the petitioner were rejected by the Chairman, Clause 26.2 envisaged the petitioner approaching the Committee of Conciliators before seeking recourse to arbitration.

10. Mr. Gopalakrishnan, learned counsel for the petitioner has, on the other hand, chosen to rely on the judgment of a coordinate Bench of this Court in *Oasis Projects Ltd v. M.D. National Highway and*



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Infrastructure Development Corporation Ltd² which has, to an extent, held that provision for conciliation contained in Clause 26.2 of the contract is only voluntary and directory in nature and it is not necessary for a party to travel that path before invoking arbitration.

11. Mr. Shekhar submits that the decision in **Oasis Projects Limited** is distinguishable as that was a case in which the Court relied on Section 77 of the 1996 Act, which permits a party to seek recourse to arbitration before exhausting the prescribed conciliation procedure in the case of urgency, and the Court found that the facts before it disclosed such a situation. He submits that *per contra*, in the present case, there are no pleadings, as would disclose any such situation of urgency, as would justify invocation of Section 77 of the 1996 Act.

12. To my mind, it is not necessary for this Court to venture into that thicket. Clause 26.2 envisages a three stage procedure. Stage 1 requires the contractor to seek a decision on its claim by the AE or by an independent Conciliator. In the event of the Conciliator not doing so, or arriving at a decision adverse to the contractor, Stage 2 requires the contractor to approach the Chairman of the respondent, who would then convene a joint meeting between the party and the respondent within seven business days to examine the merits of the contractor's claim. Should this exercise also prove abortive, Stage 3 requires the contractor to seek recourse to the Conciliation Committee of Independent Experts. It is only thereafter that Clause 26.2 envisages the dispute being referred to arbitration.



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13. The jurisdiction of the Court under Section 11(6) of the 1996 Act is galvanized when, under the procedure agreed upon between the parties for appointment of the Arbitral Tribunal, one or the other party fails to act. Thus, the Court acquires jurisdiction immediately on the default, of either party, in adhering to the pre-arbitral or arbitral procedure envisaged in the contract.

14. In the present case, Mr. Shekhar is unable to dispute the fact that, despite three reminders issued by the petitioner for exhausting Stage 1 of the procedure envisaged by Clause 26.2, which requires the matter to be referred to an independent Conciliator to be appointed by the respondent, the respondent did not do so.

15. In my opinion, the matter ends there. Once the respondent failed to adhere to the pre-arbitral protocol envisaged by Clause 26.2, the petitioner *ipso facto* became entitled to invoke arbitration.

16. The fact that the petitioner may have thereafter approached the Chairman, who may have not condescended to accede to the petitioner's claim, cannot wish away the default of the respondent not appointing a Conciliator, to comply with Stage 1 of the procedure envisaged by Clause 26.2 of the contract.

17. The default of the respondent to appoint a Conciliator as envisaged by Clause 26.2 despite three reminders having been sent by the petitioner, amounts to failure on the part of the respondent, to act as required by the procedure for appointment of the Arbitrator, which would include the pre-arbitral protocol within the meaning of Section

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11(6)(a) of the 1996 Act.

18. That being so, the petitioner was justified in approaching this Court for appointment of the Arbitrator.

19. Mr. Gopalakrishnan, submits that though the amount due from the respondent, as per his client is yet to be quantified, it would be in the region of approximately ₹18 Crores.

20. In these circumstances, this Court appoints Mr. A.K. Behera, Senior Advocate (Tel. 9810022498), as the arbitrator, to arbitrate on the disputes between the parties.

21. The arbitration shall take place under the aegis of the Delhi International Arbitration Centre (DIAC) and would abide by its rules and regulations.

22. The learned arbitrator shall be entitled to charge fees as per schedule of fees maintained by the DIAC.

23. The learned arbitrator is also requested to file the requisite disclosure under Section 12(2) of the 1996 Act, within a week of entering on reference.

24. All questions of fact and law are left open for being urged in the arbitral proceedings. This order is being passed without prejudice to the contentions of both sides and without prejudice to their respective rights.

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25. The petition stands allowed in the aforesaid terms with no orders as to costs.

C.HARI SHANKAR, J

AUGUST 12, 2024/yg

Click here to check corrigendum, if any

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