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

+ **ARB.P. 552/2024**

M/S. IONS HYDRO PRIVATE LIMITED Petitioner

Through: Mr. Anand Singh and Mr. Kartik
Malhotra, Advocates.

versus

STATE OF NCT OF DELHI & ORS. Respondents

Through: Mr. Sanad K. Jha and Mr. Ram
Niwas, Advocates for R-2 & R-3.

CORAM:

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

ORDER

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28.05.2024

I.A. 9684/2024 (exemption)

I.A. 9685/2024 (exemption)

Exemptions granted, subject to just exceptions.

Let requisite compliances be made within 01 week.

Applications stand disposed-of.

ARB.P. 552/2024

By way of the present petition under section 11(6) of the Arbitration & Conciliation Act 1996 ('A&C Act'), the petitioner seeks appointment of a Sole Arbitrator to adjudicate upon the disputes that are stated to have arisen with respondent No.2 from acceptance letter dated 19.09.2012 bearing No. DTTDC/Engg/EE(MB)-1/23(49)/3057 as governed by the General Conditions of Contract



(‘GCCs’) issued by the Central Public Works Department (‘CPWD’) as amended *vide* O.M. dated 08.01.2010.

2. At the outset, Mr. Anand Singh, learned counsel appearing for the petitioner submits, that since only respondent No.2 is a party to the contract, the petitioner does not wish to make any claim against respondent No.1 (State of NCT of Delhi) or against respondent No.3 (Executive Engineer (MB)-I, M/s. Delhi Tourism & Transportation Development Corporation Ltd), who may therefore be dropped from the array of party-respondents in the matter.
3. Accordingly, respondents Nos.1 and 3 are deleted from the array of parties. Let amended memo of parties be filed within 01 week.
4. The petition arises in the backdrop of order dated 09.01.2024 passed by the learned District Judge (Commercial)-06, South-East, Saket, New Delhi in Civil Suit (Comm.) No.38/2023 on an application filed by respondent No.2 under section 8 of the A&C Act, claiming that the civil suit was not maintainable since there is an existing arbitration agreement between the parties.
5. As a result, by way of order dated 09.01.2024, the learned District Judge has disposed-of the suit, deciding the application under section 8 in the following terms :

“In view of the above discussion, it is held that there is valid arbitration agreement between the plaintiff and defendant no. 2 and the dispute raised in the present case is arbitrable. Defendant no. 1 is only a proforma party. Therefore, the application of the defendant no. 2 is allowed and the parties are referred for arbitration. Proceedings of the suit are closed. No order as to cost. File be consigned to Record Room.”



6. In view of the above, the petitioner seeks appointment of a Sole Arbitrator to adjudicate upon the disputes between the petitioner and respondent No.2 (now the sole respondent).
7. Issue notice.
8. Mr. Sanad K. Jha, learned counsel appears on behalf of respondent No.2 (now the sole respondent) on advance copy; and opposes the petition, submitting that the petitioner has failed to comply with the Pre-Arbitration Dispute Resolution Mechanism comprised in clause 25 of the GCCs.
9. Mr. Jha submits, that the agreed Pre-Arbitration Dispute Mechanism required that if any dispute had arisen within the ambit of clause 25, the petitioner ought to have first approached the Superintending Engineer for a decision; and thereafter, the petitioner should have escalated the matter to the Chief Engineer, within the time-frames contemplated in clause 25(i), which the petitioner has failed to do. Counsel argues that only thereafter would a reference to arbitration be tenable.
10. The relevant portion of clause 25 reads as follows :

“CLAUSE 25

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 other question, claim, right, matter or thing whatsoever in any way arising out of or relating to 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 on any matter in connection 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 instruction or decision. Thereupon, the Superintending Engineer shall give his written instructions 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 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, the contractor shall within a period of 3 days from receipt of the decision, 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.

(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 of Works, 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.”

(emphasis supplied)

11. Upon being queried however, Mr. Jha submits that order dated 09.01.2024 passed by the learned District Judge has never been challenged by the respondent.
12. Upon considering the submissions made by learned counsel for the parties, this court is of the opinion that the issue of reference to arbitration already stands closed *vide* order dated 09.01.2024 passed by the learned District Judge on the respondent's own application under section 8 of the A&C Act. Admittedly, order dated 09.01.2024 has never been challenged by the respondent; nor is it under challenge in the present proceedings. What survives in the present petition therefore, is only the question of appointment of an arbitrator under section 11 of the A&C Act, since that power does not vest in the learned District Judge.
13. Accordingly in the opinion of this court, there is no merit in the objection raised on behalf of the respondent.
14. It may also be observed for sake of completeness, that though no invocation notice had been issued by the petitioner, since reference to arbitration has been made by the learned District Judge while deciding the respondent's application under section 8 of the A&C Act, there would be no requirement of issuing such notice.
15. It is also apparent from the record that disputes have arisen from an agreement between the parties which are all based in Delhi; the work



in relation to which the disputes has arisen was also done at Delhi; and therefore, arbitration is also to be held in Delhi.

16. Upon a conspectus of the averments contained in the petition, the stand taken by respondent No.2 (now the sole respondent), and the submissions made at the Bar, this court is satisfied that there is a valid and subsisting arbitration agreement between the petitioner and respondent No.2 (now the sole respondent); that this court has territorial jurisdiction to entertain and decide the present petition; and also that the disputes that are stated to have arisen between the petitioner and respondent No.2 (now the sole respondent) do not appear *ex-facie* to be non-arbitrable.
17. Accordingly, the present petition is allowed and **Mr. Yugansh Mittal, Advocate (Cellphone No.: +91 9911256665)** is appointed as the learned Sole Arbitrator to adjudicate upon the disputes between the petitioner and respondent No.2 (now the sole respondent).
18. The learned Sole Arbitrator would furnish to the parties requisite disclosures as required under section 12 of the A&C Act; and in the event there is any impediment to the appointment on that count, the parties are given liberty to file an appropriate application in this court.
19. The learned Arbitrator shall be entitled to fee in accordance with Fourth Schedule to the A&C Act; or as may otherwise be agreed to between the parties and the learned Arbitrator.
20. Parties shall share the arbitrator's fee and arbitral costs, equally.
21. All rights and contentions of the parties in relation to the claims/counter-claims are kept open, to be decided by the learned Arbitrator on their merits, in accordance with law.



22. Parties are directed to approach the learned Arbitrator appointed within 02 weeks.
23. A copy of this order be communicated by the Registry *via* e-mail to the learned Sole Arbitrator, as also to learned counsel for the petitioner and respondent No.2 (now the sole respondent).
24. The petition stands disposed-of in the above terms.
25. Other pending applications, if any, also stand disposed-of.

ANUP JAIRAM BHAMBHANI, J

MAY 28, 2024

V.Rawat