



2024:DHC:8994



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

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Date of Decision : 21.11.2024+ **ARB.P. 613/2024 and IA No.10561/2024**

SHRAWAN KUMAR SARAFF

.....Petitioner

Through: Mr. Arvind Chaudhary, Mr. Ankit
Chaudhary, Mr. Vinay Kumar, Advs.

versus

M/S GANNON DUNKERLEY AND CO. LTD.

.....Respondent

Through: Mr. Shiv. K. Tyagi, Adv. (through
V/C).**CORAM:****HON'BLE MR. JUSTICE SACHIN DATTA****SACHIN DATTA, J. (Oral)**

1. The present petition has been filed by the petitioner seeking appointment of a Sole Arbitrator to adjudicate the disputes that have arisen between the petitioner and the respondent. These disputes stem from a "Work Order" bearing number CO/0006/03-07-2021/JSPL dated 03.07.2021, issued by the respondent to the petitioner for carrying out 'Earthwork, excavation for soil/morrum of foundation, Earth work in excavation for soft rock of foundation, lead for excavated earth, soft rock and hard rock for disposal of excavated material, Backfilling, Plinth Filling etc. and its allied work in project Phase- I of civil package of HSM Project at Jspol, Angul JSPL Projects'. The order value was to the tune of Rs. 8,73,33,180/-.
2. The arbitration clause stipulated in the Work Order is in the following terms –



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“27. In the event of any difference or dispute arising out of or in connection with this Work Order, the same shall be first amicably settled by mutual dialogue. If the parties fail to settle their differences or dispute arising out of or in connection with this Work Order (including interpretation of the terms thereof) and the order/work value is more than INR one crore, the same shall be referred to arbitration. The Arbitration proceedings shall be conducted by a sole Arbitrator to be appointed by the authorised representative of GDCL, and the award/decision of such arbitrator shall be final and binding upon both the parties. The venue of the arbitration shall be New Delhi. However, you will not stop the work during the pendency of the proceedings/and shall ensure that such work is proceeded uninterruptedly.

28. This Work Order shall be governed by the Indian law and subject to exclusive jurisdiction of the courts in Delhi.”

3. Disputes arose between the parties when the respondent failed to settle the bills raised by the petitioner, amounting to ₹1,09,41,957.22. It is asserted that the respondent made a partial payment ₹25,00,000/- and further debited ₹23,82,134/- towards diesel expenses, resulting in a total adjustment of ₹48,82,134/-. Consequently, the outstanding payment claimed by the petitioner stands at ₹60,59,463.

4. The petitioner made several attempts to secure the payment, including repeated reminders, personal meetings, emails, and correspondence with officials of the respondent. Despite these efforts, the respondent failed to make any payment.

5. On 31.12.2021, the respondent denied the liability towards outstanding amount through an email. The petitioner replied on 02.01.2022, providing clarifications and supporting facts. However, the respondent did not address the issue or make any payment.

6. Subsequently, the petitioner issued a legal notice dated 16.08.2022 invoking the arbitration clause and demanding payment of ₹60,59,463.22 .



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Despite the notice, the respondent neither made the payment nor responded thereto.

7. The petitioner also sought mediation through the Central District Legal Services Authority, but the mediation attempt failed.

8. On 04.12.2023, the petitioner issued a notice invoking the arbitration. The petitioner requested the respondent to nominate an independent sole arbitrator to adjudicate the disputes between the parties.

9. In response to the petitioner's notice, the respondent sent a reply on 18.12.2023. However, the respondent did not accede to the petitioner's request. Consequently, the petitioner, in a follow-up communication dated 02.01.2024, reiterated the demand for resolving the disputes as per the mechanism outlined in Clause 27 of the Work Order.

10. Further correspondence ensued between the parties, however, the dispute/s remained unresolved. The parties could also not agree upon constitution of the arbitral tribunal.

11. In the above backdrop, the present petition has been filed by the petitioner seeking appointment of a sole arbitrator to adjudicate the disputes between the parties.

12. The respondent has sought to oppose the present petition on the following grounds :-

- i. It is argued that Clause 27 designates New Delhi as the venue of arbitration and cannot be construed as designating Delhi as the seat of arbitration. The respondent refers to Clause 3 of the General Conditions of Contract, which, they submit, expressly confers exclusive jurisdiction on the Courts in Kolkata, not Delhi.
- ii. The respondent further argues that the dispute is non-arbitrable as per



Clause 27 of the work order. It submits that arbitration is permissible only if the dispute involves a value exceeding Rs. 1 crore however, the total amount payable in the present case is ₹44,10,882/- which is below the stipulated threshold, rendering the arbitration clause inapplicable.

iii. The respondent also asserts that the petitioner has failed to adhere to the mandatory pre-arbitration conciliation process as outlined in Clauses 27 and 40 of the Work Order.

13. I find no merit in the objections raised on behalf of the respondent.

14. Regarding the respondent's first objection that this Court lacks jurisdiction to adjudicate the present petition, the legal position is well-settled, and unequivocally stated in **BGS SGS Soma v. NHPC Ltd.** (2020) 4 SCC 234, that choice of venue is akin to seat in the absence of an *contrary indica*. It has been held therein as under:-

“82. On a conspectus of the aforesaid judgments, it may be concluded that whenever there is the designation of a place of arbitration in an arbitration clause as being the “venue” of the arbitration proceedings, the expression “arbitration proceedings” would make it clear that the “venue” is really the “seat” of the arbitral proceedings, as the aforesaid expression does not include just one or more individual or particular hearing, but the arbitration proceedings as a whole, including the making of an award at that place. This language has to be contrasted with language such as “tribunals are to meet or have witnesses, experts or the parties” where only hearings are to take place in the “venue”, which may lead to the conclusion, other things being equal, that the venue so stated is not the “seat” of arbitral proceedings, but only a convenient place of meeting. Further, the fact that the arbitral proceedings “shall be held” at a particular venue would also indicate that the parties intended to anchor arbitral proceedings to a particular place, signifying thereby, that that place is the seat of the arbitral proceedings. This, coupled with there being no other significant contrary indicia that the stated venue is merely a “venue” and not the “seat” of the arbitral proceedings, would then conclusively show that such a clause designates a “seat” of the arbitral proceedings. In an



international context, if a supranational body of rules is to govern the arbitration, this would further be an indicia that “the venue”, so stated, would be the seat of the arbitral proceedings. In a national context, this would be replaced by the Arbitration Act, 1996 as applying to the “stated venue”, which then becomes the “seat” for the purposes of arbitration.”

15. The respondent has placed reliance on Clause 3 of the General Conditions of Contract as stipulated in the Work Order. The relevant clause reads as under –

“3. Governing Law

This Subcontract is construed and shall be governed as per the laws, legislation and statutory enactments as applicable and force within the territory of Republic of India and in case of any litigation arising out of or in connection with this Subcontract, the courts situated in Kolkata only shall have exclusive Jurisdiction”

16. It is well settled that the stipulation of the kind incorporated in clause 3 of the aforesaid General Conditions of Contract cannot be construed to be in the nature of ‘*contrary indicia*’ so as to divest the jurisdiction of the Court where arbitral proceedings are mandatorily required to be conducted in terms of specific covenants in the arbitration clause.

17. Importantly, Clause 3 of the GCC does not expressly referred to arbitration proceedings when it speaks of Courts in Kolkata having exclusive jurisdiction.

18. In ***Reliance Infrastructure Limited v. Mandhyanchal Vidyut Vitran Nigam Limited***, 2023:DHC:5745 this Court dealt with the similar situation wherein the Arbitration Clause stipulated that the venue of arbitration shall be New Delhi, whereas another part of the contract provided that another Court shall have exclusive Jurisdiction in all matters arising out of the Contract. It was held by this Court as under:-

“32. On a conspectus of the aforesaid judgments, the



position of law that emerges is that when the contract contains an arbitration clause that specifies a “venue”, thereby anchoring the arbitral proceedings thereto, then the said “venue” is really the “seat” of arbitration. In such a situation the courts having supervisory jurisdiction over the said “seat” shall exercise supervisory jurisdiction over the arbitral process, notwithstanding that the contract contains a clause seeking to confer “exclusive jurisdiction” on a different court.

33. In the present case, the relevant clause in the LOA purporting to confer “exclusive jurisdiction” is a generic clause, and does not specifically refer to arbitration proceedings. For this reason, the same also does not serve as a “contrary indicia” to suggest that that Delhi is merely the “venue” and not the “seat” of Arbitration. As such, the same cannot be construed or applied so as to denude the jurisdiction of the Courts having jurisdiction over the “seat” of Arbitration.”

19. In ***Cars24 Services Pvt. Ltd. v. Cyber Approach Workspace LLP***

2020:DHC:3257 it has been held as under:-

“58. Aarka Sports Management Pvt. Ltd⁴ – on which, too, Mr. Srivastava relied – did not deal with any conflict between the exclusive jurisdiction clause and the seat of arbitration clause, for the simple reason that there was no seat of arbitration clause. The contract, however, stipulated that the jurisdiction of the agreement would be exclusively “in the Courts of New Delhi, India”. In this background, this Court held that, as Delhi was not the seat of arbitration, and no cause of action arose at Delhi, this Court would not have jurisdiction to deal with the matter. Though Mr. Srivastava places reliance on the general principle, enunciated in para 24 of the report in the said case, to the effect that “once the seat is determined, the Court of that place shall have exclusive jurisdiction to deal with all matters relating to the



arbitration agreement between the parties”, that principle, in my view, would necessarily be required to be applied with caution in a case such as the present, where exclusive jurisdiction, qua a particular relief – specifically, appointment of the arbitrator – available under the 1996 Act, is contractually conferred on courts located elsewhere than at the seat of arbitration.”

20. The Division Bench of this Court in ***Yash Deep Builders LLP v. Sushil Kumar Singh and Ors***, MANU/DE/1688/2024, while relying upon the judgment rendered in ***Reliance*** (supra) has observed as under –

“42. In *Reliance Infrastructure Limited v. Madhyanchal Vidyut Vitran Nigam Limited* MANU/DE/5224/2023, another learned single judge of this court referring to several judgments held that the choice of Delhi as the venue of arbitration was demonstrative of the fact that the arbitral proceedings were intended to be anchored to Delhi, and in the absence of any contrary indicia, the inexorable conclusion was that Delhi is the seat of Arbitration. It was further held that when the contract contains an arbitration clause that specifies a "venue", thereby anchoring the arbitral proceedings thereto, then the said "venue" is really the "seat" of arbitration. In such a situation the courts having supervisory jurisdiction over the said "seat" shall exercise supervisory jurisdiction over the arbitral process, notwithstanding that the contract contains a clause seeking to confer "exclusive jurisdiction" on a different court. Further, that a generic clause, not specifically referring to arbitration proceedings would not serve as a "contrary indicia" so as to denude the jurisdiction of the Courts having jurisdiction over the "seat" of Arbitration.

43. Coming back to the facts of the present case, reference has been made by the parties to two different clauses of the collaboration agreement. One is Clause 19 (jurisdiction) which stipulates that all matters concerning the agreement and the development of the scheduled property shall be subject to



the jurisdiction of courts at Gurugram, Haryana alone. The other being Clause 23 (arbitration) stipulating that “in the event any dispute or difference arises out of or in connection with the interpretation or implementation of this agreement, or out of or in connection with the breach, or alleged breach of this agreement, such dispute shall be referred to arbitration under the Arbitration and Conciliation Act, 1996 to be decided by a sole arbitrator appointed mutually by the parties hereto. In case of any difference between the parties on appointment of a sole arbitrator, the Arbitration Tribunal shall consist of three arbitrators. The second party shall appoint one arbitrator and the first party shall appoint the second arbitrator. The third arbitrator shall be appointed by the two selected arbitrators failing which such appointment shall be done by the Arbitration Council of India, New Delhi. The decision taken by the majority of arbitrators shall be final and binding on the parties hereto. The venue of the arbitration shall be at Delhi, India.

44. Clause 23 is the arbitration clause and it is distinct from Clause 19. The arbitration contract is contained in Clause 23 and it is a complete contract between the parties relating to arbitration. When Clause 23 is read, it clearly establishes that the parties agreed that the venue of the entire arbitration proceedings would be Delhi, India. Even in case of a disagreement between the two selected arbitrators, the appointment of the third arbitrator is to be done by the Arbitration Council of India, New Delhi, Clause 23.1.5, which is under the main Clause 23 pertaining to arbitration stipulates that the provisions of the clause shall survive the termination of the agreement. This clearly shows that Clause 23 pertaining to arbitration is distinct from the collaboration agreement and is to survive even the termination of the agreement.”

21. As such, Clause 3 of the GCC does not detract from the position that Delhi is the seat of arbitration. Consequently, this Court has jurisdiction to entertain the present petition.



22. There is also no merit in the second objection raised on behalf of the respondent. Clause 27 of the agreement explicitly states: *“If the parties fail to settle their differences or disputes arising out of or in connection with this Work Order (including interpretation of the terms thereof) and the order/work value is more than INR one crore, the same shall be referred to arbitration.”* Thus, what is contemplated is that the order/work value should be more than Rs. 1,00,00,000/-. In the present case, the total orders/work value is Rs.8,73,33,180/-, as is evident from the work order itself which far exceeds threshold contemplated in the clause. As such, the objection raised by the respondent is based on misreading of the said Clause 27.

23. The respondent’s final contention is that the petitioner failed to comply with the mandatory pre-arbitration conciliation process prescribed in Clauses 27 and 40 of the Work Order. Clause 40 provides as under -

“40. Resolution of Dispute: Any dispute or difference arising out of this Work Order shall first be referred to the Project Manager/Site Incharge of the site. If no agreement is reached within 90 days, the matter shall then be referred to the COO (Chief Operating Officer), GDCL Kolkata CED, whose decision, as sole arbitrator, shall be final and binding on the Sub-Contractor.”

The respondent argues that this prescribed process was not followed, rendering the petitioner’s actions procedurally flawed.

24. It has been held by this Court in numerous judgments that pre-conditions in arbitration agreements requiring parties to exhaust pre-arbitral resolution mechanisms, such as mediation or conciliation, are directory rather than mandatory. In *Oasis Projects Ltd. v. National Highway & Infrastructure Development Corporation Limited* 2023/DHC/000828, it



was reiterated that such pre-conditions do not bar a party from invoking arbitration if they are not strictly complied with.

*“12. The primary issue to be decided in the present petition is, therefore, as to whether it was mandatory for the petitioner to resort to the conciliation process by the Committee before invoking arbitration. **Though Article 26.2 clearly states that before resorting to arbitration, the parties agree to explore conciliation by the Committee, in my opinion, the same cannot be held to be mandatory in nature.** It needs no emphasis that conciliation as a dispute resolution mechanism must be encouraged and should be one of the first endeavours of the parties when a dispute arises between them. However, having said that, conciliation expresses a broad notion of a voluntary process, controlled by the parties and conducted with the assistance of a neutral third person or persons. It can be terminated by the parties at any time as per their free will. Therefore, while interpreting Article 26.2, the basic concept of conciliation would have to be kept in mind.”*

25. In ***Kunwar Narayana v. Ozzone Overseas Pvt. Ltd*** 2021:DHC:496, the Court has made the following observations:-

*“5. Ms. Pahwa, learned Counsel for the respondents submitted that her only objection, to the petition, was that the petitioner has not exhausted the avenue of amicable resolution, contemplated by Clause 12 of the Share Buyback Agreement. I am not inclined to agree with this submission. The recital of facts, as set out in the petition, indicate that efforts at trying to resolve the disputes, amicably were made, but did not succeed. Even otherwise, the Supreme Court in *Demarara Distilleries Pvt. Ltd. v. Demerara Distilleries Ltd.* and this Court, in its judgment in *Ravindra Kumar Verma v. BPTP Ltd.*, opined that relegation of the parties to the avenue of amicable resolution, when the Court is moved under Section 11(6) of the 1996 Act, would be unjustified, where such relegation would merely be in the nature of an empty formality. The arbitration clause in the present case does not envisage any formal regimen or*



protocol for amicable resolution, such as issuance of a notice in that regard and completion of any stipulated time period thereafter, before which arbitral proceedings could be invoked. In the absence of any such stipulation, I am of the opinion, following the law laid down in Demarara Distilleries Pvt. Ltd. and Ravindra Kumar Verma v. BPTP Ltd. nothing worthwhile would be achieved, by relegating the parties to explore any avenue of amicable resolution. Besides, the appointment of an arbitrator by this Court would not act as an impediment in the parties resolving their disputes amicably, should it be possible at any point of time.”

26. Importantly, the Supreme Court in the case of ***In Re: Interplay between Arbitration Agreement under the Arbitration and Conciliation Act, 1996 and the Indian Stamp Act, 1899*** *In re*, 2023 SCC OnLine SC 1666, and ***SBI General Insurance Co. Ltd. v. Krish Spinning***, 2024 SCC OnLine SC 1754 has exclusively laid down that the scope of examination in these proceedings are confined to ascertaining, *prima facie*, the existence of an arbitration agreement. In the present case, the existence of the arbitration agreement is *prima facie* established. As such, there is no impediment in appointing an independent sole arbitrator to adjudicate the disputes between the parties.

27. Accordingly, Mr. Raman Yadav, Advocate (Mob. No. +91 9999345388) is appointed as the Sole Arbitrator to adjudicate the disputes between the parties.

28. The respondent shall be entitled to raise preliminary objections as regards jurisdiction/arbitrability, which shall be decided by the learned arbitrator, in accordance with law.

29. The learned Sole Arbitrator may proceed with the arbitration proceedings subject to furnishing to the parties requisite disclosures as



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required under Section 12 of the A&C Act.

30. The learned Sole 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 Sole Arbitrator.

31. 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.

32. Needless to say, nothing in this order shall be construed as an expression of this court on the merits of the case.

33. The present petition stands disposed of in the above terms.

SACHIN DATTA, J

NOVEMBER 21, 2024/sv