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IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision: 27.03.2024

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ARB.P. 699/2023

GARG BUILDERS

..... Petitioner

Through: Mr. Rahul Malhotra and Ms. Shruti Gupta, Advs.

Versus

HINDUSTAN PREFAB LIMITED & ANR.

..... Respondent

Through: Mr. Ripu Daman Bhardwaj, CGSC with Mr. Kushagra Kumar and Mr. K. Manamini, Advs.
Mr. Varun Nischal, Mr. Shubham Sharma, Advs. Mr. Mukesh Kumar, Legal In-Charge.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

: JASMEET SINGH, J (ORAL)

1. This is a petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking appointment of a Sole Arbitrator to adjudicate the disputes between the petitioner and the respondent.
2. The brief facts are that in 25.01.2016, respondent No. 1 for and on behalf of the respondent No. 2 invited tender vide document No. NIT No. HPL/DGM(C)/TC/NDRF/2015-16/99 dated 25.01.2016 for Construction of proposed Infrastructure for 08 Battalion of National Disaster Response Force, Ghaziabad, UP.
3. The petitioner participated in the tender and being L1 was awarded



the contract by way of Letter of Intent No. HPL/DGMT/TC/Award/NDRF (Ghaziabad)/2015-16/3065 dated 03.03.2016.

4. Thereafter the petitioner and respondent No. 1 entered into an agreement dated 21.03.2016. The arbitration clause under clause 27 of the SCC (Special Conditions of Contract) is in principle the same as clause 25 of the GCC (General Condition of Contracts). It reads as under:-

“27. Settlement of Disputes and Arbitration:

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 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 on any matter in connection with or arising out of the contract or carrying out of the work, to be acceptable, he shall promptly within 15 days request the DGM (C), HPL in writing for written instructions or decisions. Thereupon, the DGM (C), HPL shall give his written instructions or decisions within a period of one month from the receipt of the contractor's letter.

If the DGM(C), HPL 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 DGM (C), HPL, the contractor may, within 15 days of the receipt of DGM (C), HPL decision, appeal to the CMD, HPL 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 CMD, HPL shall give his decision, the contractor shall within a period of 30 days from receipt of the decision, give notice to the CMD, in the prescribed format attached with SCC as Annexure-X HPL for appointment of arbitrator 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 CMD HPL on behalf of NDRF and with the consent of NDRP. 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.

It is a term of this contract that the party invoking arbitration shall give a list of disputes with amounts claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the CMD, HPL, of the appeal.

It is also a term of this contract that no person other than a person appointed by such EMD, HPL on behalf NDRF & with the consent of NDRF, 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 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 Government shall be discharged and release 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 1966) or any statutory modifications or re-enactment, thereof and the rules made there under and for the time being in force shall apply to the arbitration proceeding under this 'clause. (Including the, fees, if any of the arbitrator) shall be in the discretion of the arbitrator who in way direct to any by whom and in what manner, such costs or any part thereof of shall be paid and fix or settle the amount of costs to be so paid.

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 claim 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 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 New Delhi. The Fees, if any, of the arbitrator shall, if required to be paid before the award is made and published, be paid and half and half by each of the parties.”

5. The petitioner had filed an earlier petition under section 11 of the Arbitration and Conciliation Act, 1996 bearing number ARB.P No.



518/2021 which was disposed of on 10.10.2022 on the ground that the petitioner had filed the petition without exhausting the pre-arbitral processes.

6. Pursuant to the judgment of this court dated 10.10.2022, the petitioner followed the pre-arbitral processes however since the disputes remained pending between the parties, the petitioner on 25.05.2023 invoked the arbitration clause and addressed a notice both to respondent Nos. 1 and 2.

7. The respondent No. 1 replied to the said notice on 26.06.2023 and the response reads as under: -

HPL/AM(Engg.)/2023-24/05

26th June, 2023

*M/s Garg Builders
110, NDM-1.
Netaji Subhash Place,
Pitampura, New Delhi-110034.*

Ref: Construction of proposed Infrastructure for 08 B08 Battalion of National Disaster Response (NDRF), Ghaziabad (UP) - regarding.

Subject: Invocation of Arbitration for the above mentioned work and request to appoint an arbitrator as per A&C Act 1996 amended in 2019)

This is with reference to your letter No. GB/HPL/NDRF/Arb/09 dated 25.05.2023 invoking arbitration clause and requesting to appoint an Arbitrator in respect of your claims.

In this connection, I would like to draw your attention with respect to agreed Clause No. 27 of SCC and Clause No. 25 of GCC. As per these terms of the arbitration clauses, HPL has written a letter to the NDRF to give their consent for the invocation of arbitration for the aforesaid work. As on date,



HPL has neither received any reply/communication nor consent from the NDRF.

As per the terms of the arbitration clause, the arbitration can happen only when the person is appointed by the CMD-HPL with the consent of the NDRF and in case the consent of NDRF is not available or it is not possible for any reason then the dispute/matter shall not be referred to arbitration at all.

In view of above, your letter dated 25.06.2021 invoking arbitration could not be considered.

*For and on behalf of
Hindustan Prefab Limited*

*(R.S. Sharma)
Assistant Manager (Engg.)*

8. Since the respondent No. 1 and 2 did not appoint an Arbitrator, the present petition has been filed.

9. Mr. Nischal, learned counsel appearing for respondent No. 1 opposes the present petition for appointment of an Arbitrator and states that in view of the arbitration clause, it is clear that arbitration can take place only when the Arbitrator is appointed by the respondent no.1 with consent of respondent no. 2 and in case respondent no.1 with the consent of respondent No. 2 could not appoint an Arbitrator, there would no arbitration at all.

10. In support, he relies upon the judgments of the Hon'ble Supreme Court in *Oriental Insurance Company Limited vs. M/s Narbheram Power and Steel Pvt. Ltd.* in Civil Appeal No. 2268/2018 and *United India Insurance Company Limited vs. Hyundai Engineering and Construction*



Company Limited and Ors, (2018) 17 SCC 607.

11. Though the judgments of *Oriental Insurance (supra)* and *United India Insurance (supra)* have held that the reference to arbitration in terms of a restricted or conditional arbitration clause needs strict adherence to the terms stipulated in the clause but the reliance on the said judgments do not help the respondent since they are both distinguishable on facts and on merits. The foundation of both the judgments rests on similar subject-matter which was with respect to insurance policy. The conditional arbitration clauses in the judgments restricted reference to arbitration if the liability was not admitted by the insurer. The Hon'ble Supreme Court held that the contract can postulate certain circumstances under which the arbitration clause cannot be given effect to and if the insurers (under similar clauses) have refused to admit liability, it forms a denial of disputes which are referable to arbitration. The operative portion of *United India Insurance (supra)* reads as under:-

“12. From the line of authorities, it is clear that the arbitration clause has to be interpreted strictly. The subject Clause 7 which is in pari materia to Clause 13 of the policy considered by a three-Judge Bench in Oriental Insurance Co. Ltd., is a conditional expression of intent. Such an arbitration clause will get activated or kindled only if the dispute between the parties is limited to the quantum to be paid under the policy. The liability should be unequivocally admitted by the insurer. That is the precondition and sine qua non for triggering the arbitration clause. To put it differently, an arbitration clause would enliven or invigorate only if the insurer admits or accepts its liability under or in respect of the policy concerned. That has been expressly predicated in the opening part of Clause 7 as well as the second paragraph of the same clause. In the opening part, it



is stated that the “(liability being otherwise admitted)”. This is reinforced and restated in the second paragraph in the following words:

“It is clearly agreed and understood that no difference or dispute shall be referable to arbitration as hereinbefore provided, if the Company has disputed or not accepted liability under or in respect of this Policy.”

Thus understood, there can be no arbitration in cases where the insurance company disputes or does not accept the liability under or in respect of the policy.”

12. The abovesaid judgments are scrutinizing conditional intention of the parties to arbitrate, as stipulated in similar arbitration clauses of similar insurance policies, which restricts reference to arbitration if there is no admission of liability by the insurer. It has postulated that the remedy of arbitration stands excluded when a claim is repudiated in totality by the insurer. However in the present case, invocation of arbitration is not conditional but contemplates an appointment of an Arbitrator by respondent no.1 with consent and on behalf of respondent no. 2.

13. The respondent further relies on *M/s Vindhya Vasini Construction Company vs. M/s Bharat Heavy Electricals Ltd, 2023:DHC:3338* passed by this court in ARB.P. 1298/2022 which considered the judgment of *Perkins (supra)* and held that having an express agreement between the parties which contemplates that there shall be no Arbitration at all in case the nominee of the respondent cannot act as an Arbitrator, then there remains no mandate on the parties which binds the parties for reference to arbitration. The operative portion of *M/s Vindhya Vasini (supra)* reads as under:-

“22. There can be no dispute on the proposition laid down in Enercon (India) Limited and Others (supra), which holds that in



interpreting or construing terms of the Arbitration Agreement, the Courts must adopt a pragmatic approach and not a pedantic or technical approach, however, in the present case, the Agreement being unambiguous, question of interpretation thereof does not arise. The learned counsel for the petitioner submits that the dominant intention of the parties was to have their disputes resolved through Arbitration and therefore, such intent be not defeated by the subsequent portion of the Clause. I do not find merit in the submission inasmuch as the parties themselves agreed that in case the nominee of the Head TBG cannot act as an Arbitrator, there shall be no Arbitration. Having expressly agreed to such stipulation, the parties are bound by this.

23. The submission of the learned counsel for the petitioner that the stipulation in Clause 23 of the Work Order insofar as it provides that in case the nominee of the Head TBG cannot act as an Arbitrator, the dispute shall not be referred to Arbitration, is unconscionable or unenforceable, also does not impress me. As noted hereinabove, arbitration is by the consent of the parties. It provides for an alternate dispute resolution mechanism. The parties in fact voluntarily agreed to have their disputes resolved through a mechanism other than the one provided by the State in form of Courts of Law. There is no mandate on the parties to necessarily have their matters resolved through Arbitration in case they do not wish to provide for the same in their Agreement. The remedy to have the disputes resolved through the mechanism of ordinary Civil Courts is still open to the petitioner. It is not as if the petitioner is left remediless by the stipulation in Clause 23."

14. Mr. Malhotra, learned counsel for the petitioner states that the above judgment is *per incuriam* since it has failed to appreciate the judgment of **Nandyal Coop. Spinning Mills LTD. vs. K.V. Mohan Rao**, (1993) 2 SCC 654 passed by the Hon'ble Supreme Court and judgments of this court in



NCR Developers. Vs. University of Delhi in ARB.P. 180/2019 *M/s ESS ESS Construction vs. Union of India*, 2017 SCC OnLine Delhi, 6804 and *Nav Nirman Construction Company vs. Executive Engineer CD- IX, Irrigation and Flood Control Department, GNCT of Delhi*, 2011 SCC OnLine Del 3948 wherein in cases of similar arbitration clauses which mandated appointment of Arbitrator by one party and in case of failure stipulates that there shall be no arbitration at all, the courts have allowed the parties to proceed with arbitration. The operative portion of the above-mentioned judgments read as under:-

a. *Nandyal Coop. Spinning Mills LTD. vs. K.V. Mohan Rao, (1993) 2 SCC 654:*

“11. It would thus be clear that if no had been appointed in terms of the contract within 15 days from the date of receipt of the notice, the administrative head of the appellant had abdicated himself of the power to appoint under the contract. The court gets jurisdiction to appoint an arbitrator in place of the contract by operation of Section 8(1)(a). The contention of Shri Rao, therefore, that since the agreement postulated preference to arbitrator appointed by the administrative head of the appellant and if he neglects to appoint, the only remedy open to the contractor was to have recourse to civil suit is without force. It is seen that under the contract the respondent contracted out from adjudication of his claim by a civil court. Had the contract provided for appointment of a named arbitrator and the named person was not appointed, certainly the only remedy left to the contracting party was the right to suit. That is not the case on hand. The contract did not expressly provide for the appointment of a named arbitrator. Instead power has been given to the administrative head of the appellant to appoint sole arbitrator. When he failed to do so within the stipulated period of 15 days enjoined under Section 8(1)(a), then the respondent has been given right under Clause 65.2 to avail the remedy



under Section 8(1)(a) and request the court to appoint an arbitrator. If the contention of Shri Rao is given acceptance, it would amount to putting a premium on inaction depriving the contractor of the remedy of arbitration frustrating the contract itself.”

(Emphasis supplied)

b. **M/s ESS ESS Construction vs. Union of India, 2017 SCC OnLine Delhi, 6804:**

“15. In the present case, it might still have been possible for the Chief Engineer to be asked to appoint an Arbitrator. However, learned counsel for the Respondent states that it is practically impossible for the Chief Engineer to now appoint an Arbitrator as such person would not be qualified in terms of the Act as amended from 23rd October, 2015. The clause in the present case envisages the applicability of the Act “or any statutory modification or re-enactment thereof.” Therefore, learned counsel for the Respondent was right in contending that under the amended Act it is not possible for the Respondent to appoint an Arbitrator. When asked whether the Chief Engineer could appoint an independent person who may not be disqualified to act as an arbitrator, learned counsel for the Respondent answered in the negative stating that the Chief Engineer would not be permitted to appoint a person other than an employee of the government itself.

16. It is high time that the Departments of the Union of India should frame a policy for the appointment of Arbitrators not inconsistent with the requirements of the Act as amended with effect from 23rd October, 2015 particularly since many of the standard clauses involving the Respondent talk of the applicability of the Act or “any statutory modification or re-enactment thereof”. A panel of competent persons both independent and qualified, to act as Arbitrators should be prepared by them for this purpose.

17. As far as the present case is concerned, with the Respondent being candid about the inability of the Chief Engineer to appoint an Arbitrator, the Court sees no impediment to refer the disputes to the arbitration of a sole Arbitrator appointed by the Court.”



c. **M/s Nav Nirman Construction Company vs. Executive Engineer CD- IX, Irrigation and Flood Control Department, GNCT of Delhi, 2011 SCC OnLine Del 3948:**

“12. The legal position, which emerges, is as follows:

- i) If the arbitration clause contains a term that a designated authority shall appoint an arbitrator, then recourse to take arbitration shall be according to the said provision.*
- ii) The position would be slightly different if there is a named arbitrator where the failure of the named arbitrator to act would nullify the arbitration clause itself. In other words, the arbitration clause, such as the one in issue, will not perish merely because the designated authority fails to appoint an arbitrator even though charged with the said obligation.*
- iii) In case of the designated authority failing to act in appointing an arbitrator after the arbitration clause has been invoked the aggrieved party is well within its right to approach the court under Section 11 of the said Act seeking the appointment of an arbitrator by the Hon'ble Chief Justice or his designate.*

If the aforesaid principles are applied to the facts of the present case, it is not disputed that the arbitration clause was invoked by the appellant. No arbitrator was appointed by the designated authority. The appellant filed an application under Section 11(6) of the said Act. The respondent took the plea of the designated authority being there to appoint the arbitrator. It is in such circumstances that the court appointed the arbitrator which was well within the authority of law.

...

14. We are, thus, not in agreement with the view taken by the learned single Judge that the arbitration clause in question can give rise to a position in law that the failure of the designated authority to appoint an arbitrator would give a go bye to arbitration or denude the Chief Justice or his designate to appoint an arbitrator. In fact, this is not a peculiar arbitration clause but such term is contained in various arbitration clauses of various authorities which have been analyzed



by the Supreme Court and this Court as is apparent from the judgement in Nandyal Coop. Spinning Mills Ltd. case (supra).”

d. **NCR Developers. Vs. University of Delhi dated 25.04.2019 in ARB.P. 180/2019:**

“10. The Court cannot decipher the understanding between the parties in a manner the Respondent is canvassing. The arbitration clause has to be given a meaningful construction. The clause gives the Respondent a right to make an appointment but not to extinguish or abandon the clause all together. If the objection of the Respondent is sustained, it would mean that arbitration can be resorted to solely as per the choice of the Respondent. The Respondent has the right to appoint an Arbitrator but not an exclusive right to decide whether to arbitrate or not. Respondent’s interpretation of the clause is not correct. Therefore, since the Respondent has failed to act as per the agreed procedure, Petitioner is well within it’s right to approach this court under Section 11 (6) (a) of the Act and the power of the court, in the facts of the present case, is not impinged.

*11. The Court's power to appoint an Arbitrator under Section 11 (6) of the Act, has been subject matter of several decisions of this Court and the Supreme Court. In the case of **Nandyal Coop. Spinning Mills Ltd (supra)**, relied upon by the Petitioner, a question arose with respect to the jurisdiction of the Court to make an appointment under Section 8 (1) (a) of the Arbitration Act, 1940 in view of a para materia Arbitration Clause. This Court held that an aggrieved party has the right to file an application under Section 8 of the Arbitration Act, 1940 Act, where the opposite party fails to appoint an Arbitrator(s) as per the terms of the Contract. The judgment of the Division Bench of this Court, in **Nav Nirman Construction Company Ltd.(supra)** also fortifies the aforementioned view. In the said case, the Single Judge while deciding objections to the award under section 34 of the Act arrived at a conclusion that in view of the arbitration clause [containing a para materia condition] failure of the designated*



authority to appoint an arbitrator would give a go bye to arbitration. Over turning the said decision, the Division Bench held that the failure of the designate authority to appoint an arbitrator cannot be construed to denude the Chief Justice or his designate to appoint an Arbitrator. Respondent has placed reliance upon Newton Engineering and Chemical Ltd. (supra) wherein the arbitration clause inter alia provided that no person other than ED(NR) or the person designated by the ED (NR) should act as an arbitrator. The question arose that if the office of ED (NR) ceased to exist in the Corporation and the parties were unable to reach at an agreed solution, whether the arbitration clause survives? The Court while interpreting the clause, expressed the view that in such a situation, the Court has no power to appoint an arbitrator for resolution of the disputes. However, it is apposite to state that on a perusal of the judgment, one cannot conclude whether the arbitration clause had a similar condition to the effect that in a certain event, there would be, "no arbitration at all" and therefore the case is distinguishable on facts. The learned counsel for the Respondent has also placed reliance on a decision of the Supreme Court in the case of ACC Ltd. (supra). A perusal of the judgment elucidates the facts in the said case are distinct and distinguishable and therefore the Court is not persuaded to rely on the aforementioned case.

12. Thus, Respondent's interpretation of the clause is not correct. Since the Respondent has failed to act as per the agreed procedure, Petitioner is well within it's right to approach this court under section 11 (6) (a) of the Act and the power of the Court, in the facts of the present case has not been encroached."

15. A perusal of the aforesaid judgments clearly shows that there the judgment of *M/s Vindhya Vasini Construction Company (supra)* has failed to appreciate the findings of the judgments in *Nandyal Coop. Spinning Mills LTD. (supra)*, *M/s NCR Developers (supra)*, *M/s ESS ESS Construction (supra)* and *M/s Nav Nirman Construction Company (supra)* which were all



prior to the judgment of *M/s Vindhya Vasini Construction Company (supra)*.

16. In *M/s Vindhya Vasini Construction Company (supra)*, the learned Single Judge held that in terms of the contract if the nominee of the head of TBG cannot act as an arbitrator, there shall be no arbitration.

17. However, the Hon'ble Supreme Court in *Nandyal Coop. Spinning Mills LTD. (supra)* had priorly held that once the power had been given to the head, in the event of him failing to do so, the Court would be competent to appoint an Arbitrator. Otherwise, it would amount to putting a premium on the inaction.

18. Further, in the case of *M/s Nav Nirman Construction Company (supra)* this court clearly held that in case of a designated authority failing to act in appointing an Arbitrator, after the arbitration clause has been invoked, the party was within its right to approach the Court under section 11 of the Arbitration and Conciliation Act, 1996. The same is also the view of *M/s NCR Developers (supra)*. Therefore in this view of the matter, with due respect, I am unable to subscribe to the view of *M/s Vindhya Vasini Construction Company (supra)*.

19. In the present case, the respondent no. 1 with the consent of the respondent no. 2 was to appoint an Arbitrator. The notice invoking arbitration was sent on 25.05.2023, however the respondents failed to appoint an Arbitrator. The present petition under section 11(6) of the Arbitration and Conciliation Act, 1996 was filed around 11.07.2023. In the Arbitration clause there was no named arbitrator but the EMD of respondent No. 1 with consent and on behalf of respondent No. 2 had to appoint an arbitrator. Since the same was not appointed, despite notice, the present petition is maintainable.



20. For the said reasons and in view of the above discussion, the petition is allowed and the following directions are issued:-

- i) Justice G.S. Sistani, (Retd.) (Mob. No. 9871300034) 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 on 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.

21. The petition is allowed and disposed of in the aforesaid terms.

JASMEET SINGH, J

MARCH 27, 2024/NG

(Corrected and released on 17.04.2024)