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

+ **ARB.P. 852/2022**

SIMPLEX INFRASTRUCTURES LTD

..... Petitioner

Through: Mr. Sayan Ray, Mr. Samrat Sengupta,
Mr. Parag Chaturvedi, Mr. Siddhant Jaiswal,
Advs.

versus

UNION OF INDIA

..... Respondent

Through: Ms. Pratima N Lakra, CGSC with Ms.
Kashish Baweja, Adv.

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+ **O.M.P. (T) (COMM.) 134/2022**

SIMPLEX INFRASTRUCTURES LTD

..... Petitioner

Through: Mr. Sayan Ray, Mr. Samrat Sengupta,
Mr. Parag Chaturvedi, Mr. Siddhant Jaiswal,
Advs.

Ms. Pooja Dua, Adv.

versus

UNION OF INDIA

..... Respondent

Through: Ms. Pratima N Lakra, CGSC with Ms.
Kashish Baweja, Adv.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

ORDER

10.01.2024

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1. The petition bearing no. Arb.P.852/2022 is filed u/s 11(6) of the Arbitration and Conciliation Act, 1996 seeking appointment of a suitable Sole Arbitrator to adjudicate the disputes arisen between the parties and the petition bearing no. O.M.P.(T)(COMM.) 134/2022 is filed u/s 14 and 15 of the Arbitration and Conciliation Act, 1996 seeking substitution of the learned Sole Arbitrator previously appointed.



2. The facts necessary for adjudication of these petition are that the parties executed a formal contract dated 28.12.2013 in respect of certain works described as follows: *“C/o 198 Nos. Multi-storeyed Type-VI Quarters for MNIT, JLN Marg, Jaipur. (SH: Civil Work i/c Internal Development Work, Electrical work i/c internal E/I, Conduit, Lighting Fixtures and Compound Lighting; Lifts; Solar Water System, Fire Alarm System, Fire Fighting and Horticulture Work)”*.
3. The petitioner is executing projects in various sectors such as transport, energy, power, mining, building, real estate etc.
4. The respondent is a functionary of the Union of India being CPWD, responsible for establishment, maintenance, upgradation of civic amenities and public facilities for genuine public benefit.
5. Since there were allegations of the petitioner not following the time schedule and disputes arose between the parties, the petitioner issued a formal notice for commencement of arbitration under Clause 25 of the contract by way of notice dated 08.12.2020.
6. The aforesaid Arbitral Clause mandates a four-step process for adjudicating disputes arisen between the parties by submitting its disputes to (i) the Executive Engineer, (ii) Appeal to Superintending Engineer, (iii) Appeal to Chief Engineer, (iv) Upon dissatisfaction of the decision of the Chief Engineer, the dispute can be referred to a Sole Arbitrator appointed by the Chief Engineer.
7. The respondent on 30.04.2021 appointed Mr. K.P. Abraham (CE, Retd, CPWD) as a Sole Arbitrator. He was an arbitrator named in the panel of the Ministry.
8. It is pertinent to mention that the learned Sole Arbitrator issued his



declaration statement under the Sixth Schedule on 14.06.2021 The said declaration reads as under:

K P Abraham
abraham.314c@gmail.com

Arbitrator

No: Arb/2021/MNIT/3

Date: 14 June 2021

SUBJECT: In the matter of Arbitration between
M/s Simplex infrastructure Ltd. - Claimant
V/s

Union of India represented by Executive Engineer - Respondent

For the work of: C/o 198 Nos. Multi-storeyed Type -VI Qtrs. for MNIT, JLN Marg Jaipur
(SH: Civil Work i/c Internal Development Work, Electrical work i/c internal E/I, Conduit,
Lighting Fixtures & Compound Lighting; Lifts; Solar Water System, Fire Alarm System, Fire
Fighting and Horticulture Work.

Agreement No.: 17/EE/CAG Project Division/2013-14

Case No.: MNIT/2021/1

Reference: The declaration by the arbitrator as per Provision of Section 12(1) (b) & Sixth
Schedule of Arbitration and Conciliation Act 1996 as amended by Arbitration and
Conciliation (Amendment) Act, 2015 vide letter no. No: Arb/2021/MNIT/2 dated
2 June 2021

Requirement as per Provision of Section 12(1) (b) & Fifth Schedule of Arbitration and
Conciliation Act 1996 as amended by Arbitration and Conciliation (Amendment) Act, 2015 is
furnished herewith.

Arbitrator's relationship with the parties or counsel	
1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party.	Arbitrator was an employee of Respondent "Union of India" but not now. No relationship with either the claimant or the Executive Engineer representing the Respondent.
2. The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.	No
3. The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.	No
4. The arbitrator is a lawyer in the same law firm which is representing one of the parties.	No
5. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties if the affiliate is directly involved in the matters in dispute in the arbitration.	No
6. The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.	No
7. The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.	No
8. The arbitrator regularly advises the appointing party or an affiliate of the appointing party even though neither the arbitrator	No



nor his or her firm derives a significant financial income therefrom.	
9. The arbitrator has a close family relationship with one of the parties and in the case of companies with the persons in the management and controlling the company.	No
10. A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.	No
11. The arbitrator is a legal representative of an entity that is a party in the arbitration.	No
12. The arbitrator is a manager, director or part of the management, or has a similar controlling influence in one of the parties.	No
13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.	No
14. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.	No
Relationship of the arbitrator to the dispute.	
15. The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.	No
16. The arbitrator has previous involvement in the case.	No
Arbitrator's direct or indirect interest in the dispute	
17. The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.	No
18. A close family member of the arbitrator has a significant financial interest in the outcome of the dispute.	No
19. The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.	No
Previous services for one of the parties or other involvement in the case	
20. The arbitrator has within the past three years served as counsel for one of the parties or an affiliate of one of the parties or has previously advised or been consulted by the party or an affiliate of the party making the appointment in an unrelated matter, but the arbitrator and the party or the affiliate of the party have no ongoing relationship.	No
21. The arbitrator has within the past three years served as counsel against one of the parties or an affiliate of one of the parties in an unrelated matter.	No
22. The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.	No
23. The arbitrator's law firm has within the past three years acted for one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator.	No



24. The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties.	No
Relationship between an arbitrator and another arbitrator or counsel	
25. The arbitrator and another arbitrator are lawyers in the same law firm.	No
26. The arbitrator was within the past three years a partner of, or otherwise affiliated with, another arbitrator or any of the counsel in the same arbitration.	No
27. A lawyer in the arbitrator's law firm is an arbitrator in another dispute involving the same party or parties or an affiliate of one of the parties.	No
28. A close family member of the arbitrator is a partner or employee of the law firm representing one of the parties, but is not assisting with the dispute.	No
29. The arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm.	No
Relationship between arbitrator and party and others involved in the arbitration	
30. The arbitrator's law firm is currently acting adverse to one of the parties or an affiliate of one of the parties.	No
31. The arbitrator had been associated within the past three years with a party or an affiliate of one of the parties in a professional capacity, such as a former employee or partner.	No
Other circumstances	
32. The arbitrator holds shares, either directly or indirectly, which by reason of number or denomination constitute a material holding in one of the parties or an affiliate of one of the parties that is publicly listed.	No
33. The arbitrator holds a position in an arbitration institution with appointing authority over the dispute.	No
34. The arbitrator is a manager, director or part of the management, or has a similar controlling influence, in an affiliate of one of the parties, where the affiliate is not directly involved in the matters in dispute in the arbitration.	No

Date: 14 June 2021

Copy to: Both the Parties


K.P. Abraham
Sole Arbitrator



9. Since the respondent sought to encash the bank guarantees of the petitioner, the petitioner filed a Section 17 application seeking interim relief on 29.07.2021 before the learned Sole Arbitrator but no orders were passed on the said date.
10. An order was passed by the learned Sole Arbitrator on 30.07.2021 declining the relief as sought by the petitioner on the ground that the said dispute was beyond the mandate of the tribunal. The same was challenged by the petitioner by way of ARB.A.(COMM.) No. 36/2021, which was dismissed by this Court on 02.08.2021, however the petitioner was given liberty to raise his disputes in the Statement of Claims.
11. Thereafter, the learned Sole Arbitrator vide letter dated 28.01.2022 terminated the arbitration proceedings u/s 25(a) of the Arbitration and Conciliation Act, 1996.
12. The petitioner through RTI obtained details of funding/sponsorship provided by the respondent to Indian Concrete Institute (hereinafter referred as 'ICI') in which the learned Sole Arbitrator was an office bearer.
13. On 02.11.2022, the respondent confirmed that it provided financial sponsorship to ICI and it routinely participates in events and/or exhibitions posted by the ICI.
14. Hence, the petition seeking substitution and appointment of an Arbitrator.
15. Ms. Lakra, learned CGSC refutes the same and states that there were no direct financial dealings in between ICI and CPWD and that there is no direct relationship of ICI with CPWD.



16. I have heard learned counsels for the parties.
17. The Seventh Schedule, Entry-1 and 13 of the Arbitration and Conciliation Act, 1996 reads as under:-
- “1. The arbitrator is an employee, consultant, advisor or has any other past or present business relationship with a party. 13. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.”*
18. Clause 12(5) of the Arbitration and Conciliation Act, 1996 reads as under:-
- “12 (5) Notwithstanding any prior agreement to the contrary, any person whose relationship, with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator: Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing.”*
19. As per the documents, the donations given by the respondent is in the name of the Chairman, Organising Committee who happens to be Mr. K.P. Abraham, i.e. the learned Sole Arbitrator in the year 2015. Even in the year 2018, Mr. K.P. Abraham is shown as the Vice President of the ICI.
20. From the facts noted above, it cannot be said that the learned Sole Arbitrator had no relationship whatsoever with CPWD. The bare minimum required of the learned Sole Arbitrator was to disclose the same to the petitioner. The declaration according to me does not meet



- the parameters of the Seventh Schedule and does not give the semblance of neutrality, which is required in arbitration proceedings.
21. The fact that the Sole Arbitrator was a senior office bearer of ICI and the fact that ICI was receiving donations and sponsorships from CPWD was undisclosed. In fact, cheques issued by the respondent in the name of the Sole Arbitrator give reasonable basis for me to allow the petition. Therefore, the appointment of the Arbitrator is hit by Clause 12(5) of the Arbitration and Conciliation Act, 1996 read with Seventh Schedule.
 22. In view of the above, the O.M.P.(T)(COMM.) 134/2022 is allowed and order dated 28.01.2022 of termination of Arbitral proceedings is set aside and hence the appointment of the learned Sole Arbitrator is to be substituted.
 23. The petitioner on 08.10.2021 submitted a final statement of claims of about Rs. 65 crores as due and payable, which was denied by the Ex. Engineer of the respondent on 27.10.2021.
 24. On 14.11.2021, in accordance with the Arbitration Clause, the petitioner approached the Superintendent Engineer of the respondent and on 03.01.2022, the Superintendent Engineer also rejected the claims of the petitioner.
 25. Thereafter, a show cause notice was issued to the petitioner for not filing a statement of claims and subsequently vide order dated 28.01.2022, the arbitration proceedings were terminated in view of Section 25 of the Arbitration and Conciliation Act, 1996.
 26. On 16.02.2022, the respondent *vide* letter of the said date constituted Modified Disputes Resolution Committee unilaterally and directed the petitioner to submit its Statement of Facts along with all claims to EE &



SM MNIT Project Division, CPWD, Jaipur, which was stated to be as per OM dated 07.02.2022.

27. Mr. Ray, learned counsel for the petitioner states that the same cannot be done unilaterally as the same is not envisaged in the arbitration agreement and the respondent has modified clause 25 of the Agreement.
28. Ms. Lakra, learned CGSC states that the process envisaged under the Arbitration Clause has not been adhered to by the petitioner. It is stated that Clause 25 mandates a procedure which is required to be followed for invocation of arbitration and the same has not been done by the petitioner.
29. The Arbitration Clause in Clause 25 of the Agreement 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 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 unacceptable, he shall promptly within 15 days request the*



Superintending Engineer in writing for written instruction or decision. Thereupon, the Superintending Engineer shall have 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 30 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 (1) 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.*

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 alongwith 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 CPWD or Additional Director General or Director General of works, CPWD 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 Government 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 re-enactment thereof and the rules made thereunder and for the time being in force shall apply to the arbitration proceeding under this clause.

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 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.”

30. In the present case, in terms of Clause 25 Sub-clause 1, the petitioner approached the Executive Engineer on 08.10.2021 with fresh sets of claims which was rejected. Thereupon, the petitioner approached the Superintendent Engineer with his grievances on 14.11.2021, and the same was also rejected. Accordingly, the petitioner approached the Special Director General on 20.01.2022. Before the said person could communicate his decision, the respondent vide letter dated 16.02.2022 constituted the Modified Disputes Resolution Committee unilaterally.
31. According to me, the petitioner followed Clause 25 in its true letter, spirit and intent and it is the respondent who has constituted the Modified Disputes Resolution Committee unilaterally. The essence of arbitration is mutuality and consensual dispute resolution. The respondent cannot unilaterally change the dispute resolution mechanism which has so sought to be done vide letter dated 16.02.2022.
32. For the said reasons, the ARB.P. 852/2022 is allowed.
33. Justice R.S. Endlaw (Retd.) (Mob. No. 9717495002) is appointed as a Sole Arbitrator to adjudicate the disputes between the parties.



34. 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.
35. The learned Arbitrator is requested to furnish a declaration in terms of Section 12 of the Act prior to entering into the reference.
36. 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.
37. The parties shall approach the learned Arbitrator within two weeks from the date of upload of this order.
38. The petitioner shall file his claim statement within two weeks from the date of upload of this order.

JASMEET SINGH, J

JANUARY 10, 2024 / (MS)

Click here to check corrigendum, if any