



\$~6

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

+

ARB.P. 715/2024

MANARANJAN BRAHMA

.....Petitioner

Through: Mr George Pothan Poothicote, Ms
Manisha Singh, Mr Prakarsh Kumar,
Ms Jyoti Singh and Ms Ashu Pathak,
Advs.

versus

NATIONAL HIGHWAY AND INFRASTRUCTURE

DEVELOPMENT CORPORATION LIMITEDRespondent

Through: Ms Reema Khurana and Mr Vikash
Kumar, Advs. with Ms Sonu Sharma,
AR

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

ORDER

23.08.2024

%

1. This is a petition filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking appointment of a sole Arbitrator for adjudication of disputes between the parties.
2. The facts are that the respondent floated a tender on 20.11.2017 for the construction of two lanes with hard shoulders of Merangkong- Tamlu-Mon road in the state of Nagaland on EPC basis from existing Km 20.456 to KM 41.065.
3. The petitioner was awarded the tender *vide* letter of Acceptance dated 28.03.2018 followed by an agreement being executed between the parties on 18.04.2018 for a contract value of Rs 161,98,50,000/-.
4. The Agreement executed between the parties contains the dispute resolution mechanism and the same reads as under:



ARTICLE 26 DISPUTE RESOLUTION

26.1 Dispute Resolution

26.1.1 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.

26.1.2 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 7 (seven) business day period or the Dispute is not amicably settled within 15 (fifteen) 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.

26.3 Arbitration

26.3.1 Any Dispute which is not resolved amicably by conciliation, as provided in Clause 26.2, shall be finally settled by arbitration in accordance with the rules of arbitration of the SOCIETY FOR AFFORDABLE REDRESSAL OF DISPUTES (SAROD).

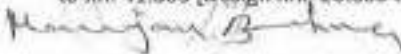
26.3.2 Deleted.

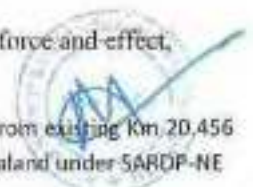
26.3.3 The arbitrators shall make a reasoned award (the "Award"). Any Award made in any arbitration held pursuant to this Article 26 shall be final and binding on the Parties as from the date it is made, and the Contractor and the Authority agree and undertake to carry out such Award without delay.

26.3.4 The Contractor and the Authority agree that an Award may be enforced against the Contractor and/or the Authority, as the case may be, and their respective assets wherever situated.

26.3.5 This Agreement and the rights and obligations of the Parties shall remain in full force and effect.

Construction of two-lane with hard shoulders of Merangkong-Tamlu-Mon Road on EPC basis from existing Km. 20.456 to Km 41.065 [Design Km. 20.000 to Km. 40.000] (Design Length - 20.00 Km) in the state of Nagaland under SAROP-NE







pending the Award in any arbitration proceedings hereunder.

26.3.6 In the event the Party against whom the Award has been granted challenges the Award for any reason in a court of law, it shall make an interim payment to the other Party for an amount equal to 75% (seventy five per cent) of the Award, pending final settlement of the Dispute. The aforesaid amount shall be paid forthwith upon furnishing an irrevocable Bank Guarantee for a sum equal to 120 % (one hundred and twenty per cent) of the aforesaid amount. Upon final settlement of the Dispute, the aforesaid interim payment shall be adjusted and any balance amount due to be paid or returned, as the case may be, shall be paid or returned with interest calculated at the rate of 10% (ten per cent) per annum from the date of interim payment to the date of final settlement of such balance.

26.4 Adjudication by Regulatory Authority, Tribunal or Commission

In the event of constitution of a statutory regulatory authority, tribunal or commission, as the case may be, with powers to adjudicate upon disputes between the Contractor and the Authority, all Disputes arising after such constitution shall, instead of reference to arbitration under Clause 26.3, be adjudicated upon by such regulatory authority, tribunal or commission in accordance with the Applicable Law and all references to Dispute Resolution Procedure shall be construed accordingly. For the avoidance of doubt, the Parties hereto agree that the adjudication hereunder shall not be final and binding until an appeal against such adjudication has been decided by an appellate tribunal or court of competent jurisdiction, as the case may be, or no such appeal has been preferred within the time specified in the Applicable Law.

5. Since there were disputes between the parties, the petitioner invoked arbitration *vide* legal notice dated 03.08.2023.
6. Notice in the present petition was issued on 21.03.2024 and thereafter, the respondent has filed a reply wherein it has been stated that the petitioner has not followed the dispute resolution mechanism as envisaged under Clause 26.
7. Ms Khurana, learned counsel for the respondent states that the petitioner was required to undertake conciliation proceedings before invoking arbitration as envisaged under clause 26.2 and 26.3 of the Agreement.
8. She further states that since the Agreement was foreclosed by way of a Foreclosure Agreement dated 16.08.2021 and the last and final bill was given by the petitioner is in terms of the foreclosure Agreement, hence, the



present petition will not lie as the petitioner himself had assailed the foreclosure.

9. It is further stated that on one hand the petitioner is stating that the Foreclosure Agreement was signed under duress and on the other hand is raising the disputes under the Foreclosure Agreement.

10. I have heard learned counsel for the parties.

11. In the present case, the notice for invoking arbitration was issued by the petitioner on 03.08.2023, however the respondent recommended that the disputes between the parties be sent to a conciliation committee and the same was agreed by the petitioner *vide* letter dated 30.09.2023.

12. Subsequently, the conciliation committee of three members was formed and the respondent asked the petitioner to deposit a demand draft of Rs. 5 lakhs to commence the conciliation proceedings. The constitution of the conciliation committee was intimated to the petitioner *vide* letter dated 25.10.2023. An objection was raised by the petitioner *vide* letter dated 10.11.2023 on the formation of the conciliation committee on account of the same not being in accordance with the terms of the Agreement. However, the respondent did not reply to the said objection raised by the petitioner.

13. Petitioner *vide* letter dated 20.12.2023 again reminded the respondent regarding the initiation of the conciliation proceedings but no steps were taken by the respondent.

14. To my mind, in terms of Clause 26.2 of the agreement, it was the Chairman/Managing Director of the Board of director of Contractors who was to do the conciliation and not the committee constituted by the respondent and in any case the petitioner could not have been asked to deposit the amount of Rs. 5 lakhs to commence the conciliation proceedings.



15. For the said reasons, I am of the view that the petitioner duly complied with the mandate of Clause 26.2 of the Agreement and the respondent did not proceed thereafter, hence the petitioner followed the conciliation process in terms clause 26 of the Agreement.

16. In addition, the dispute with regard to the Foreclosure Agreement and the petitioner having accepted the same and hence given up his right to claim any amount are issues which touch the merit of the factual controversy and the same will be decided by the Arbitral Tribunal.

17. Ms Khurana, learned counsel for the respondent submits that the Arbitration clause of the Agreement mandates that the Arbitration must be in accordance with the rules of arbitration of the Society for Affordable Redressal of Disputes (SAROD).

18. In this regard, learned counsel for the petitioner draws my attention to a judgment dated 22.03.2024 passed in ARB.P. 1011/2023 titled as “**Rani Construction Pvt. Ltd. vs. Union of India**”. The operative portion of the judgment reads as under:-

“10. Thereafter, again vide order dated 17.11.2023, learned counsel who appeared on behalf of SAROD sought time to take specific instructions as to whether the primary membership of SAROD is a pre-requisite for taking recourse to the arbitration under the rules of SAROD. Thereafter, a reply was filed on behalf of SAROD in these proceedings wherein it has been specifically averred as under:-

“6. It is submitted that Rule 4.4 of the Society for Affordable Redressal of Disputes ("SAROD") Arbitration Rules ("SAROD Rules") provide for primary membership of SAROD for invoking arbitration under the SAROD Rules 11. Vide order dated 15.12.2023, it was specifically recorded as under:- It is submitted that Rule 1 of the SAROD Rules defines the scope of its application as when by way of any agreement, submission or



reference, arbitration is referred to SAROD or under the SAROD Rules. Rule 1 is reproduced herein below for ready reference:

"1.1 Where any agreement, submission or reference provides for arbitration at the Society for Affordable Redressal of Disputes ("SAROD"), or under the Arbitration Rules of the SAROD and where the case is a domestic arbitration, it shall be conducted in accordance with the following Rules, or such Rules as amended by the SAROD where the amendments take effect before the commencement of the Arbitration. Parties may adopt following clause for inclusion in the contract:

'Any dispute or difference whatsoever arising between the parties and of or relating to the construction, interpretation, application, meaning, scope, operation or effect of this contract or the validity or the breach thereof, shall be settled by arbitration in accordance with the rules of arbitration of the "SAROD" and the award made in the pursuance thereof shall be final and binding on the parties subject to the Provisions of The Arbitration and Conciliation Act, 1996.'

11. Vide order dated 15.12.2023, it was specifically recorded as under:-

"5. On a specific query to the learned counsel for SAROD as to whether SAROD is willing to make its panel available for constitution of the arbitral tribunal, learned counsel for SAROD submits that it will not possible for SAROD to do so, without the petitioner taking membership of SAROD."

12. In view of the above, it is evident that the contractual mechanism that is prescribed for constitution of arbitral tribunal as per SAROD Rules cannot be implemented unless and until both the petitioner and the respondent become members of SAROD.

13. In the aforesaid conspectus, the question that arises for consideration is whether an arbitral institution, whose rules have been adopted by the parties, and which has been entrusted with the task of



constituting the arbitral tribunal, can insist that the parties to the arbitration agreement must take membership of the said institution, as a pre-condition for taking requisite steps in terms of the agreement between the parties.

14. Learned counsel for the petitioner is right in contending that the contractual stipulation whereby the parties agreed that the arbitration would be conducted as per the rules of arbitration of SAROD, did not carry with it an additional obligation that the parties would take primary membership of SAROD.

....

16. I find merit in the contention of the petitioner that an arbitration agreement under which the parties agree on conducting arbitration as per rules of a particular arbitral institution, cannot be construed as subsuming within it, an additional obligation to become member/s of that arbitral institution. Becoming a member of an arbitral institution, which is a society registered under the Societies Registration Act, 1860, carries with it additional obligation/s which has nothing to do with the agreement between the parties to arbitrate. Such an obligation cannot be insisted as a prerequisite for taking recourse to arbitration. In the present case, insistence on the part of the SAROD that the parties must take membership of SAROD as a pre-condition for taking necessary steps to constitute an arbitral tribunal as per its rules, impinges on the validity of the appointment procedure; amounts to failure to perform the function entrusted to the concerned institute under the procedure agreed to by the parties, and consequently attracts Section 11(6)(c) of the A&C Act, 1996 and making it incumbent on this Court to take requisite steps to constitute the arbitral tribunal.

17. Since SAROD rules cannot be applied to conduct of the arbitration between the parties in the present case for the aforesaid reason, and since the parties have not arrived at an agreement for constitution of three-member arbitral tribunal as proposed by the petitioner in notice dated 15.02.2023, it is incumbent on this Court to appoint a sole arbitrator to adjudicate the disputes between the parties.



18. *The Supreme Court in Sime Darby Engg. SDN. BHD. v. Engineers India Ltd.*, (2009) 7 SCC 545, has held, as per Section 10(2) of the A&C Act, that where the number of arbitrators is not determined, the Arbitral Tribunal shall consist of a sole arbitrator. Relevant extracts of the said judgment are as under:

“23. Section 10 deviates from Article 10 of the UNCITRAL Model Law only in the sense that Section 10(1) of the Act provides that despite the freedom given to the parties to determine the number of arbitrators such numbers shall not be even number. But in default of determination of the number, Section 10(2) provides that the Tribunal is to consist of a sole arbitrator. Therefore, scheme of Section 10(2) of the Act is virtually similar to Article 10(2) of the UNCITRAL Model Law.

24. In the instant case Clause 12.2 of the arbitration clause is silent about the number of arbitrators. Therefore, Section 10(2) of the said Act squarely applies.

25. The learned counsel for the respondent has referred to a passage at p. 185, Paras 4-18 of Redfern and Hunter, Law and Practice of International Commercial Arbitration, 4th Edn. But looking at the said book this Court finds that the said passage was (sic has) not been properly quoted. In Paras 4-15 of the said book it has been provided as follows:

“A sole arbitrator shall be appointed unless the parties have agreed in writing otherwise, or unless the LCIA Court determines that in view of all the circumstances of the case a three-member tribunal is appropriate.” In the said paragraph it has also been stated that there are distinct advantages of referring a dispute to a sole arbitrator on grounds of speed and economy: “A sole arbitrator does not need to ‘deliberate’ with others, without having to spend time in consultation with colleagues in an endeavour to arrive at an agreed or majority determination of the matters in dispute.” (p. 184)

....



26. *Similar opinion has been expressed in Russell on Arbitration, 23rd Edn. at p. 129, Paras 4-35 with reference to arbitration it has been said: “Where no choice is made, the law implied a reference to a tribunal consisting of a sole arbitrator.” In fact Section 15(3) of the (English) Arbitration Act, 1996 provides for the same. Mustil and Boyd on Commercial Arbitration, 2nd Edn. also contains the same statement of law. At p. 174 of the said book it has been provided that “an arbitration agreement calls for a reference to a single arbitrator, either if it contains an express stipulation to that effect, or if it is silent as to the mode of arbitration”.*

27. *In the instant case, the arbitration Clause 12.2 is silent as to the number of arbitrators. The said clause read with Section 10(2) of the Act makes it very clear that the Arbitral Tribunal in the instant case would be consisting of a sole arbitrator.*

.....

29. *Insofar as reference to the expression “arbitrator(s)” in Clause 12.3 is concerned, the same does not in any way affect the intention of the parties in Clause 12.2. It is noted in this connection that the parties have freedom to change the number of arbitrators even after the contract has been entered and by mutual consent the parties may amend the contract. If that takes place, in such an eventuality Clause 12.3 provides that the arbitrator or arbitrators have to give reasoned award in respect of each dispute and difference referred. Here also the expression which has been used is “him” which also points to a sole arbitrator.”*

19. In ***Rani Consturction Pvt. Ltd. (supra)***, the Coordinate Bench of this Court held that the Arbitral procedure under SAROD Rules cannot be implemented unless and until both the petitioner and the respondents become members of SAROD. Admittedly, the petitioner is not a member of



SAROD and has no intention to become one.

20. Further, the Coordinate Bench also held that the insistence upon one of the party to take membership of SAROD Rules as a pre-condition for taking steps to constitute Arbitral Tribunal impinges upon the validity of the appointment procedure. It was further held that since SAROD Rules could not be applied for conduct of the Arbitration, a Sole Arbitrator needed to be appointed. The same position is applicable to the facts of the present case.

21. For the said reasons, the petition is allowed. Since the parties are still having disputes between them, the following directions are issued:-

- i) Mr. Justice Jayant Nath (Retd.) (Mob. No. 9810032986) 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/counter-claims and 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.

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

JASMEET SINGH, J

AUGUST 23, 2024

sr

Click here to check corrigendum, if any