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

+ **ARB.P. 792/2023**

M/S. CONARCH ASSOCIATES

..... Petitioner

Through: Mr Gaurav Varma, Mr Vivek Rudra
and Mr Sudeep Vijayan, Adv.

versus

M/S HSCC INDIA LTD & ANR.

..... Respondents

Through: Mr Harshit Agarwal, Adv. (through
VC) with Mr Kanal Kumar and Mr
Aasheesh Gupta, Adv. for R-1.
Mr Vivek Singh, Mr Sarfaraz Khan,
Mr Onkar Nath and Mr Anuj Mirdha,
Adv. for R-2.

CORAM:

HON'BLE MR. JUSTICE JASMEET SINGH

ORDER
21.03.2024

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1. This is a petition under Section 11(5) of the Arbitration & Conciliation Act, 1996 seeking appointment of an Arbitrator for adjudication of disputes between the parties.
2. The respondent No.1 floated Tender No. HSCC/NRHM-UP/ 2014/02 dated 28/02/2014 which was awarded to the petitioner. The petitioner was awarded the tender on 16.12.2014 and letter of commencement was issued on 05.05.2015. The arbitration clause is contained in clause 67 of General Conditions of Contract (GCC) which reads as under:

“SETTLEMENT OF DISPUTES

67.1 Engineer's Decision

If a dispute of any kind whatsoever arise between the Employer and the Contractor in connection with, or arising out of, the Contract or



the execution of the Works, whether during the execution of the Works or after their completion and whether before or after repudiation or other termination of the Contract, including any dispute as to any opinion, instruction, determination, certificate or valuation of the engineer, the matter in dispute shall, in the first place, be referred in writing to the Engineer, with a copy to the other party. Such reference shall state that it is made pursuant to this Clause. Not later than the eighty fourth day after the day on which he received such reference the Engineer shall give notice of his decision to the Employer and the Contractor. Such decision shall state that is made pursuant to this Clause.

Unless the Contract has already been repudiated or terminated, the Contractor shall, in every case, continue to proceed with the Work with all due diligence and the Contractor and the Employer shall give effect forthwith to every such decision of the Engineer unless and until the same shall be revised, as hereinafter provided in an amicable settlement or an arbitral award.

If either the Employer or the Contractor be dissatisfied with any decision of the Engineer, or the Engineer fails to give notice of his decision on or before the eighty fourth day after the day on which he received the reference, then either the Employer or the Contractor may, on or before the seventieth day after the day on which he received notice of such decision, or on or before the seventieth day after the day on which the said period of 84 days expired, as the case may be give notice to the other party, with a copy for information to the Engineer of his intention to commence arbitration as hereinafter provided, as to the matter in dispute. Such notice shall establish the entitlement of the party giving the same to commence arbitration, as hereinafter provided, as to such dispute and, subject to Sub-Clause 61.4, no arbitration in respect thereof may be commenced unless such notice is given.



If the Engineer has given notice of his decision as to a matter in dispute to the Employer and the Contractor and no notice of intention to commence arbitration as to such dispute has been given by either the Employer or the Contractor on or before the seventieth day after the day on which the parties received notice as to such decision from the Engineer, the said decision shall become final and binding upon the Employer and the Contractor.

67.2 Conciliation

Where notice of intention to commence arbitration as to dispute has been given in accordance with Sub Clause 67.1, arbitration of such dispute shall not be commenced unless, the parties have explored the possibility of conciliation as per the provisions of Part-III of the Arbitration and Conciliation Act, 1996. When such conciliation has failed, the parties shall adopt the following procedure for arbitration.

67.3 Arbitration

67.3.1 Any dispute and differences relating to the meaning of the specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship or materials used 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, 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 completion or abandonment thereof in respect of which :-

a) the decision, if any, of the Engineer has not become final and binding pursuant to Sub Clause 67.1 and



b) Conciliation has not been reached as per the provisions of Clause 67.2 Shall be referred to the Sole Arbitration of a person appointed by the Chairman and Managing Director (CMD) of HSCC (I) Ltd. from the panel of Arbitrators approved by Mission Director, NHRM(U.P). Such Arbitrator shall be appointed within 30 days of the receipt of letter of invocation of Arbitration duly satisfying the requirements of this clause.

67.3.2 If the Arbitrator so appointed resigns his appointment, is unable or unwilling to act due to any reason whatsoever, or dies, the Chairman and Managing Director aforesaid or in his absence the person discharging the duties of CMD of HSCC (I) Ltd. may appoint a new Arbitrator in accordance with these terms and conditions of the contract, to act in his place and the new Arbitrator so appointed may proceed from the stage at which it was left by his predecessor.

67.3.3 It is a term of the contract that the party invoking the Arbitration shall specify the dispute/differences or questions to be referred to the arbitrator under this clause together with the amounts claimed in respect of each dispute.

67.3.4 The Arbitrator may proceed with the Arbitration ex-parte, if either party, in spite of a notice from the Arbitrator, fails to take part in the proceedings.

67.3.5 The work under the contract shall continue, if required, during the Arbitration proceedings.

67.3.6 The Arbitrator shall make speaking Award and give reasons for his decision in respect of each dispute/claim alongwith the sums awarded separately on each individual item of dispute or difference or claims. The Arbitrator shall make separate award on each reference made to him.



67.3.7 The award of the Arbitrator shall be final, conclusive and binding on both the parties.

67.3.8 Subject to the aforesaid, the provisions of the Arbitration & Conciliation Act, 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 proceedings and Arbitrator shall publish his Award accordingly.

67.4 Failure to Comply With Engineer's Decision

Where neither the Employer nor the contractor has given notice of intention to commence arbitration of a dispute within the period stated in Sub-Clause 67.1 and the related decision has become final and binding either party may, if the other party fails to comply with such decision, and without prejudice to any other rights it may have, refer the failure to arbitration in accordance with sub-Clause 67.3 as if the conditions specified in clauses 67.3(a) and (b) had been satisfied with respect to such dispute. The provisions of Sub-Clause 67.1 shall not apply to any such reference."

3. The last bill of the petitioner was submitted on 19.03.2019. Since the bills were not paid, the petitioner invoked the arbitration vide Legal Notices dated 13.09.2021, 28.02.2022 and 16.04.2022.
4. The Legal Notice dated 13.09.2021 is addressed to the Chairman & Managing Director of respondent No.1 and the Legal Notice dated 28.02.2022 to General Manager/Project. The notice invoking arbitration dated 16.04.2022 is addressed to the Director (Engineering), HSCC (India) Limited.
5. Clause 26.1 of the GCC reads as under:

"26.1 Compliance with Statues Regulations



The Contractor shall conform in all respects, including by the giving of all notices and the paying of all fees, with the provision of:

(a) any National or State Statute, Ordinance, or other Law, or any regulation, or bye-law of any local or other duly constituted authority in relation to the execution and completion of the Works and the remedying of an defects therein, and

(b) the rules and regulations of all public bodies and companies whose property or rights are affected or may be affected in any way by the Works, and the Contractor shall keep the Employer indemnified against all penalties and liability of every kind for breach of any such provision.

Provided always that the Employer shall be responsible for obtaining any planning, zoning or other similar permission required for the Works to proceed and shall indemnify the Contractor in accordance with Sub-Clause 22.3.”

6. A perusal of Clause 67.1 shows that the petitioner was to approach the Engineer of respondent No.1 with the disputes. The Engineer was required to adjudicate upon the disputes between the petitioner and respondent No.1 and thereafter the petitioner was to approach for conciliation. It is only thereafter that the petitioner could have invoked the mechanism of arbitration.

7. The Coordinate Bench of this Court in ARB.P 782/2022 titled ***M/s Chabbras Associates v. M/s HSCC India Limited & Anr.*** decided on 18.01.2023 has held as under:

“6. A reading of the above Clause clearly shows that before



invoking the arbitration, the parties have agreed to the dispute resolution mechanism, where the dispute is first referred to the Reviewing Authority, thereafter to the Appealing Authority and finally to the DRC. It is only where either of the parties is dissatisfied with the decision of the DRC that such party can invoke arbitration. Even the notice invoking arbitration has to give a reference to the decision of the Appealing Authority.

*7. In **Sushil Kumar Bhardwaj v. Union of India**, 2009 SCC OnLine Del 4355, this Court has held that the procedure prescribed in the Agreement before invocation of the Arbitration Agreement necessarily needs to be followed, as Section 11 of the Act can be invoked only where the parties have failed to act under the prescribed procedure. The petitioner itself having failed to act in accordance with the prescribed procedure, cannot invoke the remedy of Section 11 of the Act.*

8. In view of the above, the present petition is dismissed as being premature. It is clarified that this Court has not expressed any opinion on the merits of the claim of the petitioner as raised in the present petition. The petitioner shall always have the liberty to file a fresh petition under Section 11 of the Act, if so required, after following the procedure prescribed in the Agreement.”

8. The facts of the present case are similar and in the present case the petitioner has not followed the procedure prescribed under clause 67 of the contract between the parties.

9. For the said reasons, the present petition is dismissed as being premature.

10. This Court has not expressed any opinion on the merits of the claims of the petitioner.

11. The petitioner shall have the liberty to file fresh petition under Section 11 of the Arbitration & Conciliation Act, if so required after following the procedure prescribed in the agreement.



12. The time period consumed by the petitioner in pursuing the present petition will be considered as and when a fresh petition is filed alongwith application under Section 14 of the Limitation Act, 1963.

JASMEET SINGH, J

MARCH 21, 2024

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Click here to check corrigendum, if any