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

+ **ARB.P. 842/2023**

**MALHOTRA CONSTRUCTION PRIVATE LTD ..... Petitioner**

Through: **Mr. Sanjay Bansal, Adv.**

versus

**rites ltd & ANR.**

**..... Respondents**

Through: **Mr. GS Chaturvedi, Mr. Ashok  
Choudhary, Mr. Amit Patel, Adv.  
Mr. Satyakam, Adv.**

**CORAM:**

**HON'BLE MR. JUSTICE JASMEET SINGH**

**ORDER**

**29.04.2024**

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1. This is a petition under section 11 of Arbitration and Conciliation Act, 1996 (“1996 Act”) seeking appointment of the Sole Arbitrator to adjudicate the disputes and claims between the parties.

2. The brief facts are that respondent No. 1 acting as an agent/power of attorney holder of respondent No. 2 i.e. Commissioner of Delhi Police invited tenders for “Construction of Police Stations and Staff Quarters at Shahdara, Delhi dated 30.08.2013. The petitioner’s bid dated 23.09.2013 was found to be most competitive and the work was awarded to the petitioner *vide* Letter of Acceptance dated 12.02.2014. Pursuant to this, a formal agreement was entered into by the parties herein on 10.03.2014 for works amounting to Rs. 24,99,98,989/-. Clause 25 of the agreement provided the arbitration clause which reads as under:



### *“Settlement of Disputes & Arbitration*

*Except where otherwise provided in the Contract all questions and disputes relating to the meaning of the specifications, design, drawings and instructions herein 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.*

*1) 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 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 Engineer-in- Charge in writing for written instruction or decision. Thereupon, the Engineer-in-Charge shall give his written instructions or decision within a period of one month from the receipt of the Contractor's letter.*

*If the Engineer-in-Charge 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 Engineer-in-Charge, the Contractor may, within 15 days of the receipt of the Engineer-in- Charge decision, appeal to the Appellate Authority specified in Schedule ‘F’ 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 Appellate Authority 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 Appointing Authority specified in Schedule 'F' for appointment of arbitrator failing which the said decision shall be final binding and conclusive and not referable to adjudication by the arbitrator.*

*2) 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 Appointing Authority. The selection of Arbitrator by the Appointing Authority will be governed by the fact whether the dispute is (i) between two- Public Sector Enterprises or (ii) between a Public Sector Enterprise and a Government Department or (iii) Otherwise.*

*In case the dispute does not fall under item (i) or (ii) of this Para the Appointing Authority, shall appoint the sole Arbitrator. Within 30 days of receipt of notice from the Contractor to refer the dispute for Arbitration, the Appointing Authority stipulated in Schedule F shall send to the Contractor a list of three serving officers of RITES of appropriate status depending on the total value of claim, who have not been connected with the work under the Contract. The Contractor shall, within 15 days of receipt of this list select and communicate to the Appointing Authority, the name of one officer from the list who shall then be appointed as the Sole Arbitrator. If the Contractor fails to communicate his selection of name within the stipulated period, the Appointing Authority shall without delay, select one officer from the list and appoint him as the Sole Arbitrator."*

**3.** As there were disputes between the parties, the petitioner issued notice under Clause 25(1) to the Engineer-in-Charge raising its claims as the respondents failed to make payments. Since there was no response from the



respondents, petitioner invoked the arbitration clause *vide* letter dated 24.05.2023 seeking a claim of Rs. 34,28,62,866/-.

4. Respondent *vide* its letter dated 19.06.2023 (through its Addl. General Manager) replied to the above letter and stated that the clause provides for Arbitrator though associated with the respondent No. 1 but not with the same project and suggested panel of 3 names. Petitioner *vide* letter dated 03.07.2023 stated that respondent No. 1 has no right to suggest the names of the Arbitrator and further stated that Clause 25 of GCC is contrary to the law laid down by the Hon'ble Supreme Court of India. Hence the present petition.

5. Mr. Chaturvedi, learned counsel for the respondent No. 1 states that the respondent No. 1 is not a proper and necessary party to the arbitration proceedings.

6. Mr Bansal, learned counsel for the petitioner as well as Mr. Satyakam, learned standing counsel for respondent No. 2 has drawn my attention to clause 25(6) of the agreement which reads as under:-

*“(6) Parties to be impleaded in the arbitration proceedings.  
In case of any claims by the Contractor, the Employer as well as RITES Ltd acting as Agent to the Employer will implead themselves as parties to the Arbitration Proceedings.”*

7. Hence, I am of the view that respondent Nos. 1 and 2 both are proper and necessary parties to the arbitration proceedings.

8. Further, Mr. Chaturvedi, learned counsel for the respondent No. 1 has drawn my attention to Clause 25(3) of the agreement which reads as under:-

*“(3) In case the dispute falls under item (i) or (ii) of Sub Para (2) above, the Appointing Authority shall refer the dispute for Arbitration by one of the Arbitrators in the Department of*



*Public Enterprises to be nominated by the Secretary to the Govt, of India in charge of the Department of Public Enterprises. The Arbitration & Conciliation Act 1996 shall not be applicable to the Arbitration in such a case. The Award of the Arbitrator shall be binding upon the parties to the dispute, provided however that any party aggrieved by such award may make a further reference for setting aside or revision of the Award to the Law Secretary, Department of Legal Affairs, Ministry of Law & Justice, Govt, of India. Upon such reference, the dispute shall be decided by the Law Secretary or the Special Secretary/Additional Secretary when so authorized by the Law Secretary, whose decision shall bind the parties finally and conclusively. The Parties to the dispute will share equally the cost of Arbitration as intimated by the Arbitrator. The Arbitrator shall make a speaking Award and the Award may be published on plain paper. In the event of the Sole Arbitrator dying, neglecting or refusing to act or being unable to act for any reason, it shall be lawful for the Secretary to the Govt, of India in charge of the Department of Public Enterprises to nominate another person in place of the outgoing Arbitrator to act as Sole Arbitrator. The new Arbitrator as appointed shall as far as practicable proceed from the stage where it was left by the outgoing Arbitrator.*

*It is a term of this Contract that the party invoking arbitration shall give a list of disputes with amount claimed in respect of each such dispute along with the notice for appointment of arbitrator and giving reference to the rejection by the Appellate Authority of the appeal in the form at Annexure F'. It is a term of this Contract that "Excepted matters" or matters where the decision of the Engineer-in-Charge or any higher authority has been stipulated as "Final and Binding" in various Clauses of Contract, stand specifically excluded from the purview of Arbitration Clause.*



*It is also a term of this Contract that no person other than a person appointed by such Appointing Authority 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 Employer shall be discharged and released of all liabilities under the Contract in respect of these claims.”*

9. Referring to the above clause, he states that only respondent No. 1 can appoint the arbitrator.

10. I am unable to agree with the above contention as the law is settled in this regard. The Hon’ble Supreme Court has time and again held that the party to a contract cannot unilaterally appoint the arbitrator for adjudication of disputes. The Hon’ble Supreme Court while considering **TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377** in **Perkins Eastman Architects DPC v. HSCC (India) Ltd., (2020) 20 SCC 760** has held as under:-

*“21. But, in our view that has to be the logical deduction from TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72] Para 50 of the decision shows that this Court was concerned with the issue, “whether the Managing Director, after becoming ineligible by operation of law, is he still eligible to nominate an arbitrator” The ineligibility referred to therein, was as a result of operation of law, in that a person having an interest in the dispute or in the outcome or decision thereof, must not only be*



*ineligible to act as an arbitrator but must also not be eligible to appoint anyone else as an arbitrator and that such person cannot and should not have any role in charting out any course to the dispute resolution by having the power to appoint an arbitrator. The next sentences in the paragraph, further show that cases where both the parties could nominate respective arbitrators of their choice were found to be completely a different situation. The reason is clear that whatever advantage a party may derive by nominating an arbitrator of its choice would get counter-balanced by equal power with the other party. But, in a case where only one party has a right to appoint a sole arbitrator, its choice will always have an element of exclusivity in determining or charting the course for dispute resolution. Naturally, the person who has an interest in the outcome or decision of the dispute must not have the power to appoint a sole arbitrator. That has to be taken as the essence of the amendments brought in by the Arbitration and Conciliation (Amendment) Act, 2015 (3 of 2016) and recognised by the decision of this Court in TRF Ltd. [TRF Ltd. v. Energo Engg. Projects Ltd., (2017) 8 SCC 377 : (2017) 4 SCC (Civ) 72]”*

**11.** In view of the above, respondent No. 1 or either of the parties to a contract cannot appoint an arbitrator for adjudication of the disputes. Hence the above arbitration clause cannot be acted upon.

**12.** In addition, if the arbitration clause has to be read as a whole then the disputes mentioned in (i) and (ii) of Clause 25(2) i.e. between two public sectors or between a public sector enterprise and a Government department shall be referred for arbitration and the 1996 Act will not apply. On the other hand, if the disputes fall under the category (iii) of Clause 25(2), then 1996 Act will apply.



**13.** In the present case at hand, the petitioner is a private party and the respondent No. 2 is the Government Department, hence the disputes with private party does not fall under any of the category neither in (i) nor in (ii) of Clause 25(2). Consequently, the disputes will fall under category (iii) of Clause 25(2) and the 1996 Act will apply. As a result, the rigors of Section 12(5) of 1996 Act will also be applicable.

**14.** Learned counsel for the respondent No. 2 is agreeable for reference of disputes to arbitration.

**15.** For the said reasons, the petition is allowed with the following directions:-

- i.** Mr. Justice Rajiv Sahai Endlaw (Retd.) (Mob. No. 9717495002) 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.

**JASMEET SINGH, J**

**APRIL 29, 2024/DM**

*Click here to check corrigendum, if any*